FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

MAY 1988
Volume 10
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DECISIONS

MAY 1988

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

ORDER

MAY 1988

Review was granted in the following cases during the month of May:

Charles Conatser v. Red Flame Coal Company, Docket No. KENT 87-168-D. (Judge Koutras, March 29, 1988)

Secretary of Labor, MSHA v. Kaiser Coal Corporation, Docket No. WEST 88-131-R. (Judge Melick, April 20, 1988)

No cases were filed in which review was denied.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 12, 1988

WESTERN FUELS-UTAH, INC.	:	
	:	
v.	:	Docket No. WEST 86-108-R
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEST 86-245
	:	
WESTERN FUELS-UTAH, INC.	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

The Commission issued its decision in this matter on March 25, 1988, affirming the decision of Commission Administrative Law Judge Roy J. Maurer, in which the judge concluded Western Fuels-Utah, Inc. ("Western Fuels") was liable for a violation of a mandatory safety standard and assessed a civil penalty of $250 for the violation. 10 FMSHRC 256 (March 1988). On April 22, 1988, Western Fuels filed a petition for review of the Commission's decision in the United States Court of Appeals for the District of Columbia Circuit (No. 88-1313). In connection with its appeal, Western Fuels has submitted to the Commission a motion requesting a stay of the Commission's decision, during the pendency of judicial review, insofar as that decision requires payment of the $250 civil penalty. See 30 U.S.C. § 816(c); Fed. R. App. P. 18. Counsel for the Secretary of Labor has filed an opposition to this motion, which states in part:

> While a contested civil penalty continues to be litigated, the Mine Safety and Health Administration Office of Assessments routinely suspends any action to collect the [civil penalty] monies involved.

> This policy has been and continues to be followed in this case.

Secretary's Opposition at 1. Given the Secretary's representation that the Department of Labor will not attempt to collect the civil penalty involved in this matter during the pendency of appellate litigation, there is no need for a stay of the Commission's decision.

Accordingly, upon consideration of the motion and opposition, the motion is denied.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 10, 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 86-40-M
MICHAEL W. BRUNSON	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Mine Act" or "Act"). The issue presented is whether Michael Brunson, within the meaning of section 110(c) of the Mine Act, knowingly authorized a violation of 30 C.F.R. § 56.9003. 1/ Commission Administrative Law

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1/ Section 110(c) of the Mine Act states:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this [Act] or any order incorporated in a final decision issued under this [Act], except an order incorporated in a decision issued under subsection (a) of this section or section [105(c)] of this [Act], any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person

Judge James A. Broderick determined that Michael Brunson, as an agent of a corporate mine operator, knowingly authorized a violation of that mandatory safety standard. The judge assessed a civil penalty of $300 against him. 9 FMSHRC 257 (February 1987)(ALJ). We conclude that substantial evidence does not support the judge's decision. Accordingly, we reverse.

In January 1985, the Brunson Construction Company, Inc. ("Brunson Construction"), an Alabama corporation, operated two sand and gravel pits in Clarke County, Alabama, including Pit No. 4, the site involved in this case. Two unsupervised employees, Charles Gwin, the operator of a front-end loader, and Dwight Garrick, a laborer, worked at Pit No. 4. W.D. Brunson was president of the corporation and, according to Gwin, routinely visited Pit No. 4 "to see [if] everything [was] fine and then he [would go] out." Tr. 42. W.D. Brunson's son, Michael Brunson, was Vice President of Brunson Construction, and was listed on the Department of Labor's Mine Safety and Health Administration ("MSHA") legal identity report as the company official with overall responsibility for health and safety matters. Michael Brunson had never been to Pit No. 4 and had visited the company's other pit only a few times. Most of his time was spent in the company office at Saraland, Alabama. Tr. 63; Exh. G-1. T.J. Johnson, listed on the MSHA report as superintendent in charge of safety and health at Pit No. 4, had left the company some months prior to January 1985.

On January 23, 1985, during a regular inspection at Pit No. 4, MSHA Inspector Charles A. Bates observed Gwin seated in the front-end loader with the motor running. The inspector joined Gwin in the cab and proceeded to test the loader's brakes on level ground and inclines. Having determined that the brakes were not holding due to leaks in the air line and in the left front wheel brake booster, the inspector issued a combined section 104(a) citation/section 107(a) imminent danger withdrawal order, 30 U.S.C. §§ 814(a) & 817(a), alleging a violation of 30 C.F.R. § 56.9003. (Although the citation/order stated that it had been issued to Michael Brunson, it was actually issued to Gwin. Tr. 22-23; Exh. G-2.) Repairs to the brakes were made, and the citation/order was terminated on February 11, 1985.

Brunson Construction subsequently paid a civil penalty of $500 proposed by the Secretary of Labor for the violation of 30 C.F.R. § 56.9003. On February 25, 1986, the Secretary, pursuant to section 110(c) of the Mine Act, filed a petition for assessment of an individual civil penalty against Michael Brunson, alleging that, as an agent of the

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under subsections (a) and (d) of this section.

30 U.S.C. § 820(c).

30 C.F.R. § 56.9003 provides:

> Mobile equipment brakes:
>
> Powered mobile equipment shall be provided with adequate brakes.

corporate mine operator, he had knowingly authorized, ordered, or carried out the violation of section 56.9003.

At the hearing in this matter, Michael Brunson represented himself. 2/ The Secretary's principal witness at the hearing was Gwin, upon whose testimony the judge based his findings of fact. Gwin initially testified that he had not reported any brake problem to "Mike Brunson" but had told "Mr. Brunson" of "a slight leak in the brakes" either a long time before or at least four or five days prior to issuance of the citation/order. Tr. 35. Judge Broderick asked Gwin to which of the Brunsons he referred. In answer, Gwin repeated several times that he meant W.D. Brunson. Tr. 35-36.

Counsel for the Secretary then asked for "a moment" and the hearing went off the record. When the record reopened -- without explanation as to what had transpired while off the record -- Gwin testified that after the citation and imminent danger order had been issued, he telephoned Michael Brunson at the company office to inform him of MSHA's actions. Tr. 36.

The following exchange among counsel for the Secretary, Judge Broderick and Gwin then occurred:

> Q. Do you remember telling [MSHA Special Investigator] Bob Everett that approximately one week before [MSHA Inspector] Charlie Bates got there that you reported to the boss man, Mr. Mike Brunson, that the brakes were bad?
>
> A. I can't recall that right now. It was a week, you said, before then?
>
> Q. Approximately a week before Charlie Bates got there that you reported the brakes going bad to Mr. Michael Brunson, your "boss man" as you called him?
>
> A. I believe I told him, I do remember that now. I told him, I did report it to Mr. Brunson, Mr. Mike, yes, I did.
>
> Q. Mr. Mike, you mean this man right here?
>
> A. Yes, sir. Yes, sir. That was a week, I think, before then.
>
> JUDGE BRODERICK: Before the order was issued?

2/ Michael Brunson did not contest the violation of section 56.9003. The only question before us is whether Michael Brunson knowingly authorized the violation.

THE WITNESS: Yes. Was going bad, I didn't say they was bad.

Tr. 37.

On cross-examination by Michael Brunson, Gwin testified that he had told W.D. Brunson that, despite the leak, the brakes were holding. Tr. 40. He also stated that the loader's brakes were working when he started work on the day that the violation was cited, but that they were not holding when Inspector Bates examined them later that day. Tr. 40.

When Gwin was asked again by the judge whether he had informed W.D. or Michael Brunson of the brake problem, he again responded that he had told "Mr. Brunson" of the brake leak. Tr. 43. Gwin also stated he had informed "Mr. Brunson" that there was no danger at that time, and had been told that "if there was any danger to shut the machine down and as soon as he can [Mr. Brunson was] going to get the mechanic up there to check it out...." Tr. 43. Asked again by the judge whether he had talked with Michael Brunson, Gwin answered: "I had talked to Mr. -- I believe I had talked -- I can't recall but I believe I had talked to Mr. Mike along about the same time." Tr. 43. In answer to a further question, Gwin indicated that he had called Michael Brunson after talking with W.D. Brunson; the date of this later telephone conversation was not established. Tr. 43-44. Gwin also testified that he could "not recall" just what he had said to Michael Brunson but had told him that the brakes were leaking yet holding, and had been instructed as follows: "If the brakes is bad, Charlie, make sure you shut the machine down." Tr. 44. Lastly, Gwin testified that company instructions to him had always been to shut down equipment if there was any danger. Tr. 48.

Michael Brunson, under questioning by the judge, unequivocally stated that he had not been informed by Gwin of any brake problem prior to the issuance of the citation/order on January 23, 1985, and that his father had not reported any such problem to him. Tr. 60-61, 62, 66.

The administrative law judge found that Gwin's testimony established that Gwin knew of the leak in the brakes and that he had reported that condition to the company mechanic and to W.D. Brunson. 9 FMSHRC at 258. The judge summarized Gwin's testimony concerning Michael Brunson as follows:

> [Gwin's] testimony concerning when he reported the brake problem to Respondent Michael Brunson was contradictory, but he finally stated that he told Michael Brunson about one week before the order was issued that the brakes were going bad. Respondent told him if the brakes were bad to shut down the machine. Gwin replied that the brakes had a leak but were holding.

Id. The judge "accepted as factual the testimony of Charles Gwin" that he had told Michael Brunson about a week before the citation/order was issued that the brakes on the loader "were going bad," i.e., were not adequate. 9 FMSHRC at 259. Also, it is undisputed and the judge found

that Michael Brunson "took no action to have the brakes repaired until after the order was issued." 9 FMSHRC at 258. Citing Secretary v. Kenny Richardson, 3 FMSHRC 8, 16 (January 1981), aff'd, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983), the judge concluded that "[Michael Brunson] knew or had reason to know that the brakes were not adequate" and "knowingly permitted the violation of 30 C.F.R. § 56.9003." 9 FMSHRC at 259. The judge assessed a civil penalty of $300 against Michael Brunson. Id.

We granted Michael Brunson's petition for discretionary review, which was prepared without assistance of counsel. On review, he challenges the judge's factual findings. He contends that Gwin did not inform him of the condition of the loader's brakes until January 23, 1985, after issuance of the citation/order, and that he had left standing instructions with the company's equipment operators to shut down immediately any equipment with insufficient brakes. After carefully examining the entire record, we conclude that Gwin's testimony does not constitute substantial evidence in support of the judge's key finding that Michael Brunson was informed of a problem with the loader's brakes prior to issuance of the citation/ order. Even if we were to affirm this finding, we conclude that Gwin's account of the substance of these communications is insufficient to establish that Michael Brunson knowingly authorized a violation of the cited standard within the meaning of section 110(c) of the Act.

The Commission has held previously that the proper legal inquiry for purposes of determining corporate agent liability under section 110(c) of the Act is whether the corporate agent "knew or had reason to know" of a violative condition. Secretary v. Roy Glenn, 6 FMSHRC 1583, 1586 (July 1984), citing Kenny Richardson, supra, 3 FMSHRC at 16. In Kenny Richardson, the Commission stated:

> If a person in a position to protect safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.

3 FMSHRC at 16. The Commission has applied a similar test in situations in which a violation of a mandatory standard may not exist at the time of the corporate agent's failure to act but does occur subsequent to such failure. In that context, the Commission has held that the agent acts "knowingly" in violation of section 110(c) "when, based upon facts available to him, he either knew or had reason to know that a violative condition would occur, but he failed to take appropriate preventive steps." Roy Glenn, supra, 6 FMSHRC at 1586.

Within the foregoing framework, we must determine whether substantial evidence supports the administrative law judge's findings. 30 U.S.C. § 823(d)(2)(A)(ii). As we have consistently recognized, the term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." See, e.g., Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1137 (May 1982) quoting

Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). While we do not lightly overturn a judge's factual findings and credibility resolutions (e.g., Hall v. Clinchfield Coal Co., 8 FMSHRC 1624, 1629-30 (November 1986)), neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. See, e.g., Krispy Kreeme Doughnut Corp. v. NLRB, 732 F.2d 1288, 1293 (6th Cir. 1984); Midwest Stock Exchange, Inc. v. NLRB, 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that in reviewing the whole record, an appellate tribunal must also consider anything that "fairly detracts" from the weight of the evidence that may be considered as supporting a challenged finding. Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

Here, the judge's material finding is that Gwin informed Michael Brunson approximately one week prior to the issuance of the citation/order on January 23, 1985, that there was a problem with the loader's brakes. This is the only basis upon which it has been claimed throughout this proceeding that Michael Brunson "knew or had reason to know" of a violative condition. Our review of the record convinces us that Gwin's testimony concerning this alleged conversation with Michael Brunson is too slender a reed. As the judge himself acknowledged (9 FMSHRC at 259), Gwin's testimony is contradictory. We go further: the testimony in question is also confusing, unclear, and ambiguous and it does not constitute substantial evidence.

As noted, on direct examination by the Secretary's counsel, Gwin initially stated that he had not reported the brake problem to Michael Brunson, but rather had spoken with "Mr. Brunson." Tr. 35. If anything emerges with some clarity from Gwin's account, it is that he used the name "Mr. Brunson" to refer to W.D. Brunson, Michael Brunson's father. After the judge intervened to ask Gwin to which Brunson he referred, Gwin confirmed several times that he meant W.D. Brunson. Tr. 31-36. Counsel then asked "for a moment," and the hearing went off the record. The transcript contains no explanation as to why government counsel interrupted his direct examination or what transpired while the hearing was off the record. When the hearing resumed, Gwin testified that he had called "my boss man here, Mike Brunson," after Inspector Bates had issued the order. Tr. 36. He next replied to counsel that he could not recall telling an MSHA special investigator, Robert Everett, that he had reported the brake problem to Michael Brunson about a week prior to January 23, 1985. Tr. 37. At this juncture, counsel reiterated the same leading question as to whether Gwin had spoken with Michael Brunson prior to January 23 and Gwin replied, "I believe I told him, I do remember that now," and repeated "Yes, sir. Yes, sir. That was a week, I think, before then." Tr. 37. However, when the judge next sought to elicit clarification as to the Brunson with whom Gwin had spoken, Gwin yet again referred to "Mr. Brunson" -- not "Mr. Mike" or "Michael Brunson." Tr. 43. The final attempted clarification resulted in Gwin's answer that he "can't recall" but "believe[d]" that he had talked with Michael Brunson "along about the same time," or perhaps after, he had spoken to W.D. Brunson. Tr. 43-44. The exact date or proper chronological sequence of this conversation in relation to MSHA's enforcement actions on January 23 was not established.

Considered as a whole, we conclude that this testimony does not supply adequate or reasonable support for the judge's finding that Gwin informed Michael Brunson of a brake problem before January 23, 1985. Nor do we find Gwin's testimony to be corroborated by that of Inspector Bates, who issued the citation/order, or by Special Investigator Everett, whose investigation led to the institution of the section 110(c) proceeding against Michael Brunson. In relevant part, Bates testified that Michael Brunson was apparently Gwin's only boss -- an inaccurate statement, given the uncontroverted evidence of W.D. Brunson's role at Pit No. 4. Special Investigator Everett testified that when he interviewed Gwin, Gwin told him that he had informed both Brunsons of the brake problem prior to the issuance of the citation/order. Tr. 51-52. However, Gwin stated on direct examination that he could not recall this conversation. Tr. 37. Indeed, Everett's special investigation appears to have been based in large part on his assumption that because Michael Brunson was the company safety and health official, he must have known of the brake problem and the continuing operation of the loader by Gwin at Pit No. 4. Tr. 52, 68.

Under these circumstances, we hold that substantial evidence does not support the judge's finding that Gwin informed Michael Brunson prior to January 23 of a brake problem and that there is no basis in the record for concluding that Michael Brunson "knew or had reason to know" of a violative condition involving the loader's brakes. This conclusion is sufficient to dispose of this case. We further hold, however, that even if the judge's finding that Gwin had spoken to Michael Brunson about the brakes prior to January 23 were affirmed, the substance of the communications as testified to by Gwin is insufficient as a matter of law to show that he knowingly authorized a violation of section 56.9003 within the meaning of section 110(c).

Under the principles of Kenny Richardson and Roy Glenn, supra, in order to establish Michael Brunson's liability under section 110(c), the Secretary was obligated to prove that Michael Brunson knew of the violation or possible future violation of section 56.9003 but failed to take appropriate corrective or preventive steps. Section 56.9003 states that mobile equipment shall be provided with "adequate" brakes. Gwin testified that in his conversations with management about the brakes he gave assurances that the brakes were holding and that there was no danger. Tr. 34-35, 37, 40, 43, 44. In fact, Gwin testified that on January 23, the brakes were holding prior to the inspection but had "softened" because he was operating the loader in water, and that prior to the inspection he was unaware of any leak in the line between the tank and the air compressor. Tr. 44. These communications to management failed to provide clear notification that the brakes were not adequate.

More importantly, Gwin testified repeatedly that when he informed management about the brakes, he was told to "shut the machine down" if the brakes were bad. Tr. 43-44. On cross-examination, Gwin stated that company instructions to him had always been, "If there's any danger, shut it down." Tr. 48. These instructions manifest managerial directions to Gwin that the loader was not to be used if the brakes were inadequate. Considered in conjunction with Gwin's ambiguous communi-

cations, the instructions that he received do not provide the basis necessary to support a finding that Michael Brunson knowingly authorized a violation of 30 C.F.R. § 56.9003.

Accordingly, we reverse the judge's decision, vacate the civil penalty, and dismiss the Secretary's petition for civil penalty.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 13, 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. LAKE 86-121-R LAKE 87-9
YOUGHIOGHENY & OHIO COAL COMPANY	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq. (1982)("Mine Act" or "Act"), two issues are presented: (1) Whether Commission Administrative Law Judge Gary Melick erred in concluding that the violation cited in a withdrawal order issued pursuant to section 104(d)(1) of the Mine Act was not of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard; and (2) whether the judge erred in modifying the withdrawal order to a citation issued pursuant to section 104(a) of the Act solely because the violation was not of a significant and substantial nature. 1/ We affirm the judge's finding that the violation

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1/ Section 104(d)(1) states:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the

did not significantly and substantially contribute to the cause and effect of a mine safety hazard. In addition, we hold that such a "significant and substantial" finding is not a prerequisite for the issuance of a section 104(d)(1) order of withdrawal. Accordingly, we reverse the judge's modification of the withdrawal order and remand this matter to the judge for further proceedings.

Youghiogheny and Ohio Coal Company ("Y&O") operates the Nelms No. 2 Mine, an underground coal mine located in Harrison County, Ohio. On August 1, 1986, Y&O was in the process of restarting mining inby the last open crosscut in the main north section of the mine. Y&O section foreman John Slates requested that the haulage road leading to the last open crosscut be cleaned of coal and other debris. The roof of the haulage road was fully and properly supported with resin-grouted roof bolts spaced on four-foot centers. David Parrish, a qualified scoop operator, offered to clean the road using a scoop.

Parrish's electrically powered, self-propelled scoop was not equipped with a canopy. After operating the scoop for about 45 minutes, Parrish needed to dump some refuse and waste material ("gob") left from previous mining. Parrish could not take the gob to the feeder because a buggy and another scoop were in the way. Pursuant to instructions from foreman Slates, Parrish proceeded to dump the gob at a beltline located inby the last open crosscut. After Parrish dumped the gob, Larry Ward, a union safety committeeman at the mine, alerted Parrish to the fact that it was a violation of a mandatory safety standard to operate the scoop without a canopy in the beltline area where Parrish had dumped the gob. Ward then discussed the situation with Slates, who agreed to have the scoop removed from that area.

On August 4, 1986, Department of Labor Mine Safety and Health Administration ("MSHA") Inspector Ervin Roy Dean was at the mine conducting an inspection pursuant to section 103(i) of the Act, 30 U.S.C. § 813(i). While on this inspection, Dean received a request from Ward, pursuant to section 103(g)(1) of the Act, to conduct an immediate inspection at the mine regarding Parrish's operation of the scoop inby

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> operator under this [Act]. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(d)(1) (emphasis added).

the last open crosscut. 2/ In response to this request, Dean went to the main north section and examined the area in question. Dean determined that the area had a mining height of 62 inches and concluded that operation of the scoop in that area without a canopy violated 30 C.F.R. § 75.1710-1(a)(2), which requires that all self-propelled electric face equipment operated in the active workings of mines having mining heights of 60 inches or more be equipped with substantially constructed canopies or cabs. 3/ Dean issued to Y&O an order of withdrawal that required Y&O to refrain from using the scoop in the area until the scoop was provided with a substantially constructed canopy. Dean issued the order pursuant to section 104(d)(1) of the Act because he found that Slates authorized Parrish to operate the scoop in the area at issue even though Slates knew the scoop did not have a canopy and knew that a canopy was required. Dean found that Slates' actions constituted an unwarrantable failure to comply with the standard. (The parties stipulated at the hearing that a preceding valid citation issued pursuant to section 104(d)(1) was in existence when Dean issued the section 104(d)(1) order. Tr. 6.) Dean also found that the violation significantly and substantially contributed to the cause and effect of a mine safety hazard.

Y&O contested the validity of the section 104(d)(1) order as well as the Secretary's proposed civil penalty for the violation of section 75.1710-1(a)(2). In its notice of contest of the order of withdrawal,

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2/ Section 103(g)(1) of the Act provides in part that a miners' representative may obtain an "immediate inspection" of a mine by MSHA whenever the representative "has reasonable grounds to believe that a violation of this [Act] or a mandatory health or safety standard exists...." 30 U.S.C. § 813(g)(1).

3/ In relevant part, 30 C.F.R. § 75.1710-1(a)(2) provides:

> (a) Except as provided in paragraph (f) of this section, all self-propelled electric face equipment, including shuttle cars, which is employed in the active workings of each underground coal mine on and after January 1, 1973, shall, in accordance with the schedule of time specified in paragraphs (a)(1), (2), (3), (4), (5), and (6) of this section, be equipped with substantially constructed canopies or cabs, located and installed in such a manner that when the operator is at the operating controls of such equipment, he shall be protected from falls of roof, face, or rib, or from rib and face rolls. The requirements of this paragraph (a) shall be met as follows:
>
> * * * *
>
> (2) On and after July 1, 1974. in coal mines having mining heights of 60 inches or more, but less than 72 inches.

Y&O conceded that it had violated section 75.1710-1(a)(2) but argued that "[t]he facts surrounding the issuance of [the] order do not meet the requirements for unwarrantable failure." At the hearing, Y&O also asserted that during a section 103(g)(1) inspection it is improper for an inspector to cite a violation that has occurred in the past.

In his decision the judge found it unnecessary to address Y&O's section 103(g)(1) argument due to his conclusion that the order of withdrawal was otherwise deficient. 9 FMSHRC at 1066. The judge found that because the Secretary did not prove that the violation significantly and substantially contributed to the cause of a mine safety hazard, the order must fail under section 104(d)(1). Accordingly, the judge modified the order to a section 104(a) citation. 30 U.S.C. § 814(a). The judge made no finding as to whether the violation was the result of Y&O's unwarrantable failure to comply with the cited standard, but found that the violation was the result of "gross operator negligence" and assessed a civil penalty of $400. 9 FMSHRC at 1067. 4/

We granted the Secretary's petition for discretionary review of the judge's decision. The Secretary asserts that, contrary to the judge's decision, the evidence of record establishes that the violation was of a significant and substantial nature. In addition, the Secretary argues that the judge erred by modifying the section 104(d)(1) withdrawal order to a section 104(a) citation on the basis of his conclusion that the violation did not significantly and substantially contribute to the cause and effect of a mine safety hazard. 5/

The first issue is whether the judge erred in concluding that the violation was not of a significant and substantial nature. The judge found that the Secretary had not "met the requisite burden of proof for establishing the [violation] was ... significant and substantial." 9 FMSHRC at 1067. Because we find the judge's finding to be supported by substantial evidence, we affirm.

A violation is properly designated as being of a significant and substantial nature "if, based on the particular facts surrounding that

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4/ The Mine Act authorizes the Commission to make an independent penalty assessment based upon the criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i). See, e.g., Black Diamond Coal Mining Co., 7 FMSHRC 1117, 1121 (August 1985). One of the statutory criteria upon which the assessment of a civil penalty is based is "whether the operator was negligent." 30 U.S.C. § 820(i). The Commission has recognized that the penalty criterion of negligence and an inspector's finding of unwarrantable failure made pursuant to section 104(d) of the Act are not identical, although frequently they are based upon the same or similar factual circumstances. Quinland Coals, Inc., 9 FMSHRC 1614, 1622. (September 1987).

5/ Before the judge, however, the Secretary asserted that a significant and substantial finding was a prerequisite for the issuance of a section 104(d)(1) order, and the inspector testified to the same effect. S. Post-Hearing Br. 8; Tr. 18.

violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum, 3 FMSHRC at 822, 825 (April 1981); Youghiogheny & Ohio Coal Co., 9 FMSHRC 673, 677 (April 1987); see also Consolidation Coal Co. v. FMSHRC, 824 F.2d 1071, 1078-79 (D.C. Cir. 1987). In Mathies Coal Co., 6 FMSHRC at 1, 3-4 (January 1984) the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary ... must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co.,Inc., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. 6 FMSHRC at 1836. Further, the violation itself "must be evaluated in terms of continued normal mining operations." U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984).

In the present case, there is no dispute as to the fact of violation or that the discrete safety hazard contributed to by the violation was the danger posed to the scoop operator by the lack of a canopy in the event of a roof fall. Additionally, there is no dispute that any injury resulting from the roof fall would likely be serious. The chief issue, therefore, is whether there was a reasonable likelihood of a roof fall.

As noted above, the significant and substantial nature of a violation must be determined "based on the particular facts surrounding the violation." National Gypsum, supra, 3 FMSHRC at 825. The particular facts surrounding the violation at issue support a finding that a roof fall was not reasonably likely to occur. It is undisputed that while operating the scoop in the area of the violation, Parrish was under roof supported with resin-grouted rods on centers of four-feet or less at all times. Although the inspector stated that the roof was "shaly" and had been given a chance to "work" while the area was being rehabilitated, the Secretary does not argue nor imply that the roof support in the area was out of compliance with the mine's MSHA-approved roof control plan or was not adequately supported as required by 30 C.F.R. § 75.200. Because the particular facts surrounding this violation indicate that the roof was properly and adequately supported, the judge correctly accorded little weight to the general rationale of

Y&O conceded that it had violated section 75.1710-1(a)(2) but argued that "[t]he facts surrounding the issuance of [the] order do not meet the requirements for unwarrantable failure." At the hearing, Y&O also asserted that during a section 103(g)(1) inspection it is improper for an inspector to cite a violation that has occurred in the past.

In his decision the judge found it unnecessary to address Y&O's section 103(g)(1) argument due to his conclusion that the order of withdrawal was otherwise deficient. 9 FMSHRC at 1066. The judge found that because the Secretary did not prove that the violation significantly and substantially contributed to the cause of a mine safety hazard, the order must fail under section 104(d)(1). Accordingly, the judge modified the order to a section 104(a) citation. 30 U.S.C. § 814(a). The judge made no finding as to whether the violation was the result of Y&O's unwarrantable failure to comply with the cited standard, but found that the violation was the result of "gross operator negligence" and assessed a civil penalty of $400. 9 FMSHRC at 1067. 4/

We granted the Secretary's petition for discretionary review of the judge's decision. The Secretary asserts that, contrary to the judge's decision, the evidence of record establishes that the violation was of a significant and substantial nature. In addition, the Secretary argues that the judge erred by modifying the section 104(d)(1) withdrawal order to a section 104(a) citation on the basis of his conclusion that the violation did not significantly and substantially contribute to the cause and effect of a mine safety hazard. 5/

The first issue is whether the judge erred in concluding that the violation was not of a significant and substantial nature. The judge found that the Secretary had not "met the requisite burden of proof for establishing the [violation] was ... significant and substantial." 9 FMSHRC at 1067. Because we find the judge's finding to be supported by substantial evidence, we affirm.

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> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary ... must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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the inspector that "most roof falls occur" within 25 feet of the face -- a zone in which the scoop was operated. 9 FMSHRC at 1067.

In sum, given the undisputed fact that the scoop was operated at all times under supported roof, and the lack of evidence to establish a reasonable likelihood of a roof fall in the area involved, we conclude that substantial evidence supports the judge's finding that this violation was not of a significant and substantial nature. Compare Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2011-13 (December 1987).

We now turn to the issue of whether the judge erred by modifying the section 104(d)(1) withdrawal order to a section 104(a) citation. We agree with the Secretary's argument on review that the basis of the judge's modification was erroneous. The statutory language of section 104(d)(1) expressly makes a significant and substantial finding a prerequisite for the issuance of a section 104(d)(1) citation. There is, however, no statutory requirement that the inspector base a section 104(d)(1) order upon a finding that the violation significantly and substantially contributes to the cause and effect of a mine safety or health hazard. Rather, the plain language of section 104(d)(1) establishes three prerequisites for the issuance of a section 104(d)(1) withdrawal order: (1) an underlying section 104(d)(1) citation; (2) a violation of a mandatory health or safety standard found within 90 days after the issuance of the section 104(d)(1) citation; and (3) a finding by the inspector that the violation was "caused by an unwarrantable failure of [the] operator to ... comply." See n.1 supra.

This construction is confirmed by judicial precedent and legislative history. Section 104(d)(1) of the Mine Act was carried over without substantive change from section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. § 814(c)(1) (1976) (amended 1977). In UMWA v. Kleppe, 532 F.2d 1403 (D.C. Cir. 1976), cert. denied sub nom. Bituminous Coal Operators' Assn., Inc. v. Kleppe, 429 U.S. 858 (1976), the United States Court of Appeals for the District of Columbia Circuit addressed the issue of whether a significant and substantial finding was a "prerequisite to be met before a withdrawal order may issue pursuant to section [104(c)(1)]" of the Coal Act. 532 F.2d at 1405. 6/ After reviewing the language of section 104(c)(1) and the legislative history of the section, the court concluded: "The statute and the legislative history are clear. There is no [significant and substantial finding] required to be met before a section [104(c)(1)] withdrawal order may properly issue." 532 F.2d at 1407. The Mine Act's legislative history indicates no Congressional intent to change this interpretation when enacting section 104(d)(1). S. Rep. No. 181, 95th Cong., 1st Sess. 30-31 (1977), reprinted in Senate Subcommittee on

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6/ The court in Kleppe referred to the significant and substantial finding requirement of section 104(c)(1) as the section's "gravity criterion." It is clear that the phrase "gravity criterion" is the court's shorthand for the statutory language of section 104(c)(1) that the violation be "of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard." 532 F.2d at 1405.

Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 618-19 (1978).

This Commission has, on numerous occasions, addressed the statutory prerequisites for the issuance of sanctions pursuant to section 104(d) and has never held nor implied that a significant and substantial finding is required to sustain a section 104(d)(1) order. See United States Steel Corp., 6 FMSHRC 1908, 1915 n.3 (August 1984); see also Nacco Mining Co., 9 FMSHRC 1541, 1545 (September 1987), pet. for review filed, No. 88-1053 (D.C. Cir. January 27, 1988). Accordingly, we hold that a "significant and substantial" finding is not a prerequisite for the issuance of a section 104(d)(1) order.

Since the judge ruled in error that a significant and substantial finding was necessary to sustain a section 104(d)(1) order, he did not reach Y&O's contention that the violation of section 75.1710-1(a)(2) was not the result of its unwarrantable failure to comply with that mandatory safety standard. We remand this matter in order that the judge may rule on this issue and re-examine the penalty in light of that ruling. Compare Youghiogheny & Ohio Coal Co., supra, 9 FMSHRC at 2003. 7/

7/ On remand it is unnecessary for the judge to consider Y&O's assertion that the violation was invalidly cited because the violative condition was no longer in existence when cited by the inspector during an inspection conducted pursuant to section 103(g)(1) of the Act. 30 U.S.C. § 813(g)(1). Following issuance of the judge's decision, the Commission held (Chairman Ford, dissenting) that a section 104(d) sanction may be based upon a prior violation cited during a section 103(g)(1) inspection. Nacco Mining Co., supra. See also Emerald Mines Corp., 9 FMSHRC 1590 (September 1987), pet. for review filed, No. 87-1816 (D.C. Cir. December 23, 1987).

Accordingly, we affirm the judge's finding that the violation was not of a significant and substantial nature. In addition, we vacate the judge's modification of the section 104(d)(1) order to a section 104(a) citation and remand this matter to the judge to determine whether the violation was caused by Y&O's unwarrantable failure to comply with the cited standard and to re-examine the penalty.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 13, 1988

LOCAL UNION 2333, DISTRICT 29, UNITED MINE WORKERS OF AMERICA (UMWA)	:	
v.	:	Docket No. WEVA 86-439-C
RANGER FUEL CORPORATION	:	

Before: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This compensation proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act" or "Act"). The United Mine Workers of America ("UMWA") seeks compensation from Ranger Fuel Corporation ("Ranger") pursuant to the third sentence of section 111 of the Mine Act for an idling of miners following the issuance of an imminent danger withdrawal order. 1/ In denying the

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1/ In relevant part, section 111 provides:

Entitlement of miners to full compensation

> [1] If a coal or other mine or area of such mine is closed by an order issued under section [103] ..., section [104] ..., or section [107] of this [Act], all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. [2] If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. [3] If a coal or other mine or area of such mine is closed by an

parties' cross-motions for summary decision, Commission Administrative Law Judge Gary Melick held that Ranger's payment of a civil penalty proposed for a citation issued after the imminent danger withdrawal order was issued did not preclude Ranger from contesting in the compensation proceeding the violation itself or the causal relationship noted in the citation between the violation alleged therein and the withdrawal order. We granted the UMWA's petition for interlocutory review and stayed proceedings before the judge. For the reasons that follow, we conclude that Ranger's payment of the civil penalty extinguished its right to challenge the violation alleged in the citation, but we hold that Ranger may litigate in the compensation proceeding the issue of the causal relationship between the violation and the withdrawal order. Accordingly, we reverse in part, affirm in part, and remand for further proceedings.

Miners employed by Ranger at its Beckley No. 2 underground coal mine in West Virginia are represented by Local Union 2333, District 29, UMWA. 2/ At 11:30 a.m., on May 29, 1986, MSHA Inspector William Uhl issued to Ranger an imminent danger withdrawal order pursuant to section 107(a) of the Mine Act, 30 U.S.C. § 817(a), on the basis of his finding that an explosive mixture of methane gas in excess of 5% was present in

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> order issued under section [104] ... or section [107] of this [Act] for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. [4] Whenever an operator violates or fails or refuses to comply with any order issued under section [103] ..., section [104]..., or section [107] of this [Act], all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated. ...

30 U.S.C. § 821 (sentence numbers added).

2/ Because there has been no evidentiary hearing as yet in this matter, the factual background set forth in the text is based on the parties' pleadings and briefs and on the relevant order and citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA").

the mine's 7 East Section located in the longwall area of the mine. (Methane becomes explosive at a 5% concentration. See, e.g., Monterey Coal Co., 7 FMSHRC 996, 1000-01 (July 1985).) Following issuance of the withdrawal order, Ranger withdrew all miners then underground. The mine was idled from 11:30 a.m., May 29, to 7:00 p.m., May 31, 1986, when the order was modified to permit the resumption of production in certain areas of the mine other than the 7 East Section.

On June 3, 1986, Inspector Uhl issued a citation to Ranger pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a). The citation asserted that it was "based on laboratory analysis of an air sample collected on May 29, 1986" and charged Ranger with a violation of 30 C.F.R. § 75.329 in that "[t]he bleeder system [had] failed to function adequately to carry away an explosive mixture of methane in the tail entries of the 7 East Longwall Section." 3/ The citation also stated: "The citation was a factor that contributed to the issuance of the imminent danger order ...." The next day, June 4, 1986, the section 107(a) withdrawal order and the section 104(a) citation were terminated following a determination by the inspector that the methane level in the mine was below the maximum permissible level as a result of Ranger's installation of ventilation controls.

Ranger did not contest the section 107(a) withdrawal order or the citation alleging the violation of section 75.329. Rather, after receiving MSHA's notice of a proposed civil penalty assessment of $213 for the alleged violation, Ranger paid the penalty on August 29, 1986, without requesting a hearing. Ranger's payment of the penalty for the violation occurred 14 days after the UMWA had filed a section 111 complaint for compensation with the Commission and 10 days after Ranger

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3/ Section 75.329, which restates section 303(z)(2) of the Mine Act, 30 U.S.C. § 863(z)(2), provides in pertinent part:

> On or before December 30, 1970, all areas from which pillars have been wholly or partially extracted and abandoned areas ... shall be ventilated by bleeder entries or by bleeder systems or equivalent means, or be sealed .... When ventilation of such areas is required, such ventilation shall be maintained so as continuously to dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from the hazards of such methane and other explosive gases. Air coursed through underground areas from which pillars have been wholly or partially extracted which enters another split of air shall not contain more than 2.0 volume per centum of methane, when tested at the point it enters such other split. When sealing is required, such seals shall be made in an approved manner so as to isolate with explosion-proof bulkheads such areas from the active workings of the mine.

had been served with the complaint for compensation at its Beckley No. 2 Mine.

The miners working the 8 a.m. to 4 p.m. shift at the time the mine was idled on May 29 were compensated by Ranger for the remainder of that shift. Those scheduled to work the following shift from 4 p.m. to midnight on May 29 were also compensated for that shift. The complaint filed by the UMWA on August 15, 1986, sought "one-week compensation" under the provisions of the third sentence of section 111 on behalf of those miners who had been previously scheduled to work on May 30 and 31, but were idled by the withdrawal order. (Under the third sentence of section 111, miners idled as a result of a section 104 or 107 withdrawal order issued "for a failure of the operator to comply with any mandatory health or safety standards" are entitled to compensation "for such time" as they are idled "or for one week, whichever is the lesser." See n.1 supra.)

Prior to a hearing on the compensation complaint, both parties filed motions for summary decision. In its motion for summary decision, the UMWA asserted that: (1) Ranger's payment of the civil penalty proposed in connection with the section 104(a) citation established that the charged violation of section 75.329 had occurred for purposes of any subsequent proceeding under the Mine Act; and (2) the inspector's notation on the citation that there was a causal relationship between the violation and the imminent danger should be regarded, by reason of Ranger's payment of the penalty, as establishing for compensation purposes the requisite nexus between the imminent danger order and an underlying violation of a mandatory standard. Thus, the UMWA argued that all the elements necessary to sustain a compensation claim under the third sentence of section 111 were established and the idled miners were entitled to compensation as a matter of law.

In opposition to the UMWA's motion for summary decision, Ranger asserted that there were numerous factual allegations in dispute, such as the identity of the individual miners who might be entitled to compensation. Arguing for summary decision in its favor, Ranger contended that the section 107(a) withdrawal order did not allege on its face a failure by the operator to comply with a mandatory health or safety standard as required by the third sentence of section 111. Ranger further argued that the citation alleging a violation of section 75.329 was invalid because the standard applies only to bleeders ventilating old abandoned areas developed before December 30, 1970, and not to areas developed after that date, which it asserted was the case here. Ranger also argued that it should not be precluded in a compensation proceeding from contesting the validity of the citation or the violation alleged therein, even though it had paid the civil penalty proposed for the violation.

In denying both motions for summary decision, the judge found that the citation upon which the UMWA sought to establish a "causal nexus" with the imminent danger order was not contested by Ranger and that the proposed penalty had, in fact, been paid. Order Denying Motions for Summary Decision at 2 (May 14, 1987) ("Order"). However, the judge held that Ranger's payment of the civil penalty did not preclude Ranger "from

challenging either the validity of the citation (or the causal relation between the violation cited therein and the closure order at issue)" in this compensation proceeding. Id. He stated:

> Section 111 of the Act expressly provides that the form of compensation sought herein can be awarded only "after all interested parties are given an opportunity for a public hearing." That right to a public hearing would indeed be hollow if the mine operator could not litigate the critical issue of whether the order that idled the miners was issued "for a failure of the operator to comply with any mandatory health or safety standard."

Id. The judge further determined that collateral estoppel did not preclude Ranger from contesting the validity of the citation because there had been no actual litigation with respect to the existence of the alleged violation. Id. Finally, the judge held that Ranger's argument that the withdrawal order must allege a violation of a mandatory standard on its face was contrary to the Commission's holding in Loc. U. 1889, UMWA v. Westmoreland Coal Co., 8 FMSHRC 1317 (September 1986), which stated that for purposes of entitlement to compensation it is not necessary for an idling order itself to allege a violation of a standard. Order at 2-3.

We granted the UMWA's petition for interlocutory review and stayed proceedings before the judge. We also permitted the Secretary of Labor to file an amicus curiae brief. On review, Ranger and the UMWA essentially rely on the same arguments that they asserted before the judge. In brief, the UMWA argues that under the Commission's decisions in Old Ben Coal Co., 7 FMSHRC 205 (February 1985), and Westmoreland, supra, Ranger's payment of the civil penalty prevents it from challenging in this proceeding either the violation of section 75.329 as alleged in the section 104(a) citation or the inspector's notation in that citation of a causal relationship, i.e., a "nexus," between the violation and the imminent danger withdrawal order. PIR 3-4. Ranger counters that it should be permitted to demonstrate in this compensation proceeding "that no violation in fact occurred" (R. Br. 22) and to litigate the question of nexus in addition to other issues regarding entitlement of individual miners to specific sums of compensation. R. Br. 6-7. The Secretary as amicus curiae submits that Ranger's payment of the civil penalty must be "deemed a final order of the Commission" by operation of section 105(a) of the Mine Act. S. Br. 6-8. 4/ The

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4/ Section 105(a) provides in relevant part:

> Notification of civil penalty; contest
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> If, after an inspection or investigation, the Secretary issues a citation or order under section [104] of this [Act], he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail

Secretary further asserts that permitting Ranger to contest the citation in this proceeding would place miners and their representatives in the "disadvantaged litigation posture" of having to establish de novo the validity of a secretarial enforcement action. S. Br. 6, 12.

We first address the question of whether Ranger's payment of the civil penalty proposed for the violation of section 75.329 precludes it from contesting that violation in this compensation proceeding. Ranger contends that such a challenge would be limited in nature -- confined strictly to the purpose of defending itself against the section 111 compensation claim. If Ranger could establish that no violation occurred, then the UMWA would be unable to demonstrate the required nexus between a violation and issuance of the idling withdrawal order. We conclude, however, that Ranger's position cannot be reconciled with the statutory framework of sections 105 and 111 of the Mine Act and with decisions interpreting those provisions.

Section 105 of the Mine Act provides operators with two opportunities to contest and request a hearing concerning issuance of a section 104 citation. It is well-established that section 105(d) grants an operator the right to seek immediate review of an abated citation before the Secretary has proposed a civil penalty. Energy Fuels Corp., 1 FMSHRC 299, 300-09 (May 1979); Old Ben Coal Co., 7 FMSHRC 205, 207-08 (February 1985); Quinland Coals, Inc., 9 FMSHRC 1614, 1620-21 (September 1987). 5/ After a civil penalty assessment is proposed, an operator has

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> of the civil penalty proposed to be assessed under section [110(a)] of this [Act] for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. ... If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency.

30 U.S.C. § 815(a) (emphasis added).

5/ Section 105(d) provides in relevant part:

> Contest proceedings; hearing; findings of fact; affirmance, modification, or vacation of citation, order, or proposed penalty; procedure before Commission
>
> If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification

another opportunity under section 105(a) to file a notice of contest of the proposed penalty. Id. Moreover, an immediate contest of a citation under section 105(d) is not a procedural prerequisite to initiating a contest under section 105(a) of the penalty assessment proposed for that citation, and in such a penalty contest the operator may challenge the penalty as well as the fact of violation. 30 U.S.C. § 815(a); Quinland Coals, supra, 9 FMSHRC at 1621-22.

If, however, an operator fails to contest a civil penalty proposed for a citation, section 105(a) expressly provides that both "the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency." 30 U.S.C. § 815(a); see also Senate Rep. No. 181, 95th Cong., 1st Sess. 34 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, Legislative History of the Federal Mine Safety and Health Act of 1977, at 622 (1978). Further, an operator's payment of a proposed civil penalty constitutes an admission of the underlying violation and precludes the operator from continuing a pending section 105(d) contest of the violation. Old Ben, supra, 7 FMSHRC at 209. "For purposes of the Act, paid penalties that have become final orders [pursuant to section 105(a)] reflect violations of the Act and the assertion of violation contained in the citation is regarded as true." Id. See also Amax Lead Co. of Missouri, 4 FMSHRC 975, 978-79 (June 1982) (payment of a penalty in settlement operates as a concession that "for purposes of any proceedings under the Mine Act, the violations [are] to be treated as if established.") Thus, the Act's enforcement provisions have consistently been interpreted to mean that once a civil penalty is paid or becomes a final order by operation of section 105(a), the assertion of violation contained in the citation cannot be contested in a subsequent proceeding under the Mine Act. In fact, the Old Ben-Amax Lead rationale has been expressly applied in the context of a compensation proceeding to foreclose challenges of violations for which penalties were paid. Westmoreland, supra, 8 FMSHRC

> of an order issued under section [104] of this [Act], or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section [104] of this [Act], ... the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. ...

30 U.S.C. § 815(d).

at 1330; Loc. U. 2274, UMWA v. Clinchfield Coal Co., 8 FMSHRC at 1310, 1314 (September 1986).

Here, Ranger did not avail itself of either of the two opportunities granted by the Mine Act to contest the allegation of violation made in the citation. Instead, it paid the civil penalty proposed for the violation. Under these circumstances, both the validity of the citation and the amount of the civil penalty are final under section 105(a) of the Act and not subject to review. Thus, Ranger is precluded in this proceeding from challenging the violation. 6/

In addition, we agree with the Secretary that allowing an operator to challenge in a compensation proceeding the fact of violation despite having paid the relevant civil penalty would improperly place miners and their representatives in a prosecutorial role. The Secretary, as enforcer and prosecutor of the Mine Act, is a party to a section 105 enforcement proceeding but not to a section 111 compensation proceeding. 30 U.S.C. §§ 815 & 821. See Int'l U., UMWA v. FMSHRC, 840 F.2d 77, 81-82 (D.C. Cir. 1988). If an operator were permitted to make the kind of challenge advocated by Ranger, miners and their representatives would be required to perform functions properly resting within the Secretary's domain in order to prove the underlying violation or the validity of the citation or order in which the allegation of violation was contained. Given the unified scheme of the Mine Act, we find unconvincing Ranger's assertion that it would not be inconsistent to allow it to challenge the fact of violation in a compensation proceeding even though it chose not to contest the allegation of violation in an enforcement proceeding. Accordingly, we reverse the judge's determination that Ranger should be

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6/ Ranger cites Secretary v. Kenny Richardson, 3 FMSHRC 8 (January 1981), aff'd, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983), in support of its contention that a final order pursuant to section 105(a) does not have preclusive effect in a subsequent proceeding under the Mine Act. Ranger's reliance on Kenny Richardson is misplaced. In that proceeding, the corporate agent, Richardson, had been cited pursuant to section 109(c) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977), the identical predecessor provision to section 110(c) of the Mine Act, 30 U.S.C. § 820(c). The corporate operator also had been cited. In the separate proceeding against the operator, the operator had paid the proposed penalties without contesting the charges against it. At issue in the Richardson case was the Secretary's power to pursue the corporate agent even though the corporate operator had paid the penalty and was not a party in the subsequent proceeding against the agent. The Commission held that despite the operator's payment of the penalty, the Secretary was not precluded from proving the operator's violation of the standard as an element of proof in the case against the agent and the agent was not barred from contesting the allegation that a violation had occurred. 3 FMSHRC at 10. Thus, Kenny Richardson concerned the effect of a final Commission order on the enforcement of the Act against a separate respondent, whereas the present proceeding concerns the effect of a final order on the same party that had paid the penalty, i.e., the operator.

permitted in this proceeding to challenge the validity of the citation or the underlying violation.

We turn to consideration of whether Ranger's payment of the penalty also operated as an admission of a causal nexus between the violation and the imminent danger withdrawal order for purposes of determining entitlement to compensation under section 111. In Eastern Associated Coal Corp., 3 FMSHRC 1175, 1178 (May 1981), the Commission discussed the concept of "nexus" in the compensation context in describing the causal relationships between the operation of withdrawal orders and idling of miners necessary to sustain various compensation awards. One-week compensation under the third sentence of section 111 is keyed to idlements resulting from section 104 or 107 withdrawal orders issued "for a failure of the operator to comply with any mandatory health or safety standards...." In Westmoreland, the Commission held that allegations of violation of mandatory standards contained in section 104(a) citations or section 104(d) citations or orders could provide the causal nexus with a previously issued section 107(a) imminent danger withdrawal order. 8 FMSHRC at 1329-30. Thus, under applicable precedent the section 104(a) citation in the present proceeding may be examined to determine whether a nexus existed between the violative condition and the section 107(a) withdrawal order.

There is a crucial distinction, however, between the issue of the fact of violation for enforcement purposes and the separate issue of causal nexus for compensation purposes. In Westmoreland, following application of the Old Ben principle that the operator's payment of penalties established the underlying violations, the Commission nevertheless remanded the matter for a determination of whether nexus existed:

> Left unresolved, however, is the specific question of whether any of these charges of violation of mandatory standards in fact provide the necessary relationships to the section 107(a) order so as to initiate compensation under the third sentence of section 111.
>
> Because the relationship or nexus between the violations of mandatory standards and the imminent danger order is the critical issue on which statutory entitlement to one-week compensation hinges, we remand ... for further proceedings.... If such a relationship is determined, the judge shall take appropriate action to identify the affected miners and the amount of compensation due to each.

8 FMSHRC at 1330. 7/ Thus, the issue of causal nexus in a compensation

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7/ Clinchfield, supra, also involved one uncontested section 104(d)(1) citation and three section 104(d)(1) orders for which penalties had been paid. The Commission concluded that the citation and

proceeding is independent of the allegation of violation and must be addressed separately in order to determine entitlement to one-week compensation under the third sentence of section 111.

The UMWA acknowledges that the issue of causal nexus is compensation-related but relies on Old Ben to argue that Ranger should have known "full well that findings in an uncontested citation are regarded as true for purposes of all subsequent proceedings under the Act...." PIR 4 (emphasis added). We do not agree. Old Ben states only that "[p]aid penalties that have become final orders reflect violations of the Act and the assertion of violation contained in the citation is regarded as true." 7 FMSHRC at 209 (emphasis added). Old Ben in no way involved the issue of whether causal nexus is admitted for purposes of section 111 when an operator pays the civil penalty associated with a citation containing a specific notation regarding nexus.

As we have emphasized, section 105 provides two opportunities for review by which an operator may contest citations and orders issued pursuant to section 104 and proposed penalty assessments for those orders and citations. Such contest proceedings include consideration by the administrative law judge of the statutory elements necessary to prove the alleged violation and to assess a penalty. A finding of "causal nexus" is not one such element. There is no statutory basis for the compensation-related issue of causal nexus to be addressed in a section 105 enforcement hearing. Had Ranger timely contested the citation, the judge in a section 105 proceeding would properly have reserved the nexus issue for consideration in the compensation proceeding. Whatever importance the inspector's notation of nexus on a citation may serve in the Secretary's enforcement of the Act, the subject of nexus between a withdrawal order and an underlying violation becomes relevant only in a section 111 compensation proceeding.

We therefore affirm the judge's conclusion that Ranger may contest the issue of the causal nexus between the violation and the section 107(a) withdrawal order in the compensation proceeding. Finally, we conclude in agreement with Ranger that issues remain to be tried in this proceeding regarding the entitlement of individual miners to specific sums of compensation. See Loc. U. 1889, etc., UMWA v. Westmoreland Coal Co., 9 FMSHRC 1195, 1196 (July 1987).

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orders could supply the required causal nexus and remanded the matter for a determination of whether the nexus existed. 8 FMSHRC at 1314. Likewise, in Greenwich, supra, the matter was remanded to afford the parties the opportunity to litigate the question of nexus once the merits of the alleged violations were resolved. 8 FMSHRC at 1307.

Accordingly, the judge's decision is reversed insofar as it held that Ranger may contest in this compensation proceeding the fact of violation or the validity of the citation for which it has paid the civil penalty. We affirm the judge's decision insofar as it permitted Ranger to litigate the issue of the causal nexus between the fact of violation and the section 107(a) withdrawal order. We dissolve the stay and remand this matter for further proceedings consistent with this decision.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 26, 1988

RIVCO DREDGING CORPORATION	:	
	:	
v.	:	Docket Nos. KENT 88-23-R
	:	KENT 88-24-R
SECRETARY OF LABOR,	:	KENT 88-25-R
MINE SAFETY AND HEALTH	:	KENT 88-26-R
ADMINISTRATION (MSHA)	:	KENT 88-27-R

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

In this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), the Secretary of Labor filed a motion to dismiss the contest proceeding based upon the failure of Rivco Dredging Corporation ("Rivco") to notify the Secretary that it intended to contest the civil penalties subsequently proposed for the contested citations and orders. On April 20, 1988 Commission Administrative Law Judge Roy J. Maurer issued an order of dismissal. Rivco filed a response in opposition to the Secretary's motion, claiming that it believed that its previous contest of the citations and orders was sufficient to place the penalties in issue. However, the response was not received until after the judge entered his dismissal order.

Rivco filed a Petition for Discretionary Review alleging, in essence, that it had failed to notify the Secretary of its intent to contest the penalties because it had already filed a timely Notice of Contest relating to these alleged violations, and was unaware that a contest of the civil penalty proposals was also required. On May 25, 1988, the Secretary filed a response to Rivco's Petition for Discretionary Review.

It appears that this operator, acting pro se, acted in good faith but misunderstood the need to object separately to the two different aspects of the same dispute. See 30 U.S.C. § 815(a) (contest of proposed civil penalties). Cf. Old Ben Coal Co., 7 FMSHRC 205 (February 1985). This Commission has recognized that, in cases like this, innocent procedural missteps alone should not operate to deny a party the opportunity to present its objections to citations or orders. See, e.g., M.M. Sundt Constr. Co., 8 FMSHRC 1269 (September 1986); Kelley Trucking Co., 8 FMSHRC 1867 (December 1986).

In the interest of justice, we conclude that Rivco should be given the opportunity to present to the administrative law judge the reasons for its failure to contest the civil penalty proposals and the judge should evaluate its explanation in light of the precedents cited above. The judge should also address the timeliness issue raised by the Secretary in its response to Rivco's petition for discretionary review. Accordingly, we grant the petition for review, vacate the judge's order of dismissal of the contest proceeding, and remand the matter for proceedings consistent with this order.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAY 2 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 87-97
	:	A.C. No. 36-02404-03501 B-70
v.	:	
	:	Greenwich No. 2 Mine
OTIS ELEVATOR COMPANY, Respondent	:	

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Gary L. Melampy, Esq., Reed, Smith, Shaw & McClay, Washington, D.C., for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., (the "Act") for two alleged violations of the regulatory standard found at 30 C.F.R. § 77.205(b).[1/]

The issues before me are the respondent's status as an "operator" under the Act, and whether the respondent, if properly charged as an operator in this instance with violating the subject regulation, violated that regulation as alleged, and, if so, whether those violations were of such a

1/ § 77.205(b) Travelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or slipping hazards.

nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e., whether the violations were "significant and substantial." If violations are found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

The case was heard in Pittsburgh, Pennsylvania, on October 23, 1987. The parties have filed posthearing briefs and proposed findings and conclusions, and they have been considered by me in the course of this decision.

Section 104(a) "S&S" Citation No. 2690794 issued on October 29, 1986, cites a violation of 30 C.F.R. § 77.205(b) and the cited condition or practice is described as follows:

> Otis elevator personnel have created a slipping hazard when they oil the suspension ropes and grease the bearings on the suspension rope shieve (sic) drum on the 580 portal shaft elevator. An excess of oil and grease has fallen on to the travelway below this shieve (sic) drum. Employees of this coal operator have to use this travelway when they make their daily elevator examinations.

Section 104(a) "S&S" Citation No. 2690795 also issued on October 29, 1986, cites another violation of 30 C.F.R. § 77.205(b) and the cited condition or practice is described as follows:

> Otis Elevator personnel have created a slipping hazard when they oiled the suspension ropes and also when they greased the bearings on the suspension rope shieve (sic) drum on the Cookport Elevator. An excess of oil and grease has fallen on to the travelway below this shieve (sic) drum. Employees of this coal operator have to use this travelway when they make their daily examination on the Cookport Shaft Elevator.

RESPONDENT'S STATUS AS OPERATOR

All during 1986 the Otis Elevator Company (Otis) had a contract with the Pennsylvania Mines Corporation (PMC) to furnish and provide supervision, labor, equipment, tools, materials and spare parts to inspect and maintain elevators including the Cookport and 580 Shaft Elevators at PMC's Greenwich No. 2 Mine. This maintenance and service contract provided that Otis would maintain the elevator equipment in safe operating condition and more specifically that Otis would regularly

and systematically examine, adjust, lubricate, repair or replace elevator parts, as required. Under the terms of this contract, Otis was further obliged to examine periodically all safety devices and governors and make periodic no load and full load safety tests. As a practical matter, this amounted to Otis conducting weekly inspections of the elevators, performing bi-monthly safety tests and responding to trouble calls and repairing the elevators on an as-required basis. In consideration for the performance of these services, Otis received $2,604.61 per month for the 580 Shaft Elevator and $2,633.29 per month for the Cookport Shaft Elevator at the Greenwich No. 2 Mine.

There is an attachment to this contract, signed for Otis by one Carl M. Dick as Branch Manager, that arguably registers Otis as an independent contractor, including providing an address for service of MSHA citations. Further, Government Exhibit No. 9 is a Bureau of Mines Legal Identity Report which also identifies the Corporation as an independent contractor providing "servicing".

The Act contains a rather broad definition of "operator" at section 3(d):

> For the purpose of this Act, the term--
>
> * * * * * * *
>
> (d) "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine (emphasis added).

Against the background that Otis is an elevator service company whose employees, pursuant to a service contract between Otis and PMC performed inspections and conducted safety tests on a regular basis on the two elevators at the Greenwich No. 2 Mine as well as performing more extensive maintenance and repair work on those elevators on an as-needed basis, it seems patently clear to me that the language of section 3(d) of the Act intended to include them within the definition of "operator". I have previously so held in Secretary v. Otis Elevator Co., 9 FMSHRC 1933, 1935 (November 10, 1987) appeal docketed, No. PENN 86-262 (December 18, 1987). That case involved an elevator at PMC's Greenwich No. 1 Mine which was being serviced and maintained by Otis pursuant to the same contract as is herein involved.

Otis contends that it is not an "operator" subject to the jurisdiction of the Mine Act notwithstanding its service contract with PMC because of its allegedly minimal presence at the mine. The company argues that the U.S. Courts of Appeals for the Third and Fourth Circuits have concluded, based on the Act's language and its legislative history, that Congress did not intend to classify all independent contractors who might have employees on mine property as "operators" within the meaning of the Act, citing National Industrial Sand Association v. Marshall, 601 F.2d 689 (3d Cir. 1979), and Old Dominion Power Co. v. Donovan, 772 F.2d 92 (4th Cir. 1985).

Both cases are distinguishable. In National Industrial Sand Association, the issue the court was faced with was substantially different. The issue before the Third Circuit was whether the Secretary was statutorily authorized to include fewer than all independent contractors as operators for purposes of the training regulations. The Court, however, at the beginning of its analysis did set forth some general guidance:

> 'Operator' is defined in the Mine Act as 'any owner, lessee, or other person who operates, controls or supervises a coal or other mine or any independent contractor performing services or construction at such mine.' As this definition indicates, some, if not all, independent contractors are to be regarded as operators. The reference made in the statute only to independent contractors who 'perform [] services or construction' may be understood as indicating, however, that not all independent contractors are to be considered operators. There may be a point, at least, at which an independent contractor's contact with a mine is so infrequent or de minimis that it would be difficult to conclude that services were being performed. 601 F.2d at 701 (footnote omitted).

Old Dominion, supra, while an enforcement proceeding similar to the instant case, presents a very different situation factually. In Old Dominion, the utility's contacts with the mine were truly de minimis.

> The sole revenue derived by Old Dominion from its relationship with Westmoreland is for the sale of electric power. Old Dominion does not perform any maintenance at the substation, or of the transmission or distribution lines leading to and from the substation. Old Dominion's

> employees install equipment to measure voltage and amperage for its meter, maintain the meter and read it approximately once per month for purposes of billing. 772 F.2d at 93.

In holding that the MSHA regulations do not apply and were not intended to apply to electric utilities whose sole relationship to the mine is the sale of electricity, the Court stated that:

> Old Dominion's only contact with the mine is the inspection, maintenance, and monthly reading of a meter for the purpose of sending a bill to a mine company for the sale of electricity. Petitioner's employees rarely go upon mine property and hardly, if ever, come into contact with the hazards of mining.
>
> * * * * * * *
>
> MSHA seeks to regulate those few moments every month when electric utility workers read or maintain meters on mine property.
>
> * * * * * * *
>
> Plainly, Congress intended to exclude electric utilities, such as Old Dominion, whose only presence on the site is to read the meter once a month and to provide occasional equipment servicing. 772 F.2d at 96-97.

In stark contrast to the Old Dominion factual situation, I find as a fact that Otis' contractual obligations and performance thereof constituted a substantial, as opposed to a de minimis continuing presence at the Greenwich No. 2 Mine. Pursuant to its service contract, an Otis maintenance examiner conducted a weekly routine inspection of the elevators and performed any necessary maintenance work as well as preventive maintenance at that time. Every other month, he would also be required by the terms of the contract to conduct a no load safety test. Additionally, Otis responded to service calls at each elevator on average at least once per month, with more frequent calls during the winter months. Furthermore, during 1986 (the term of this contract), the Otis technician had on one or more occasions added oil to the automatic lubricating boxes for the hoisting ropes and greased the bearings on the deflector sheaves on these two elevators. Oil from these ropes and grease from these bearings are most likely the

source of the accumulations of oil and grease complained of in the citations at bar. I note here parenthetically, however, that the inspector has not, nor has anyone else, ever determined who was responsible for the specific accumulations he found on October 29, 1986. Quite frankly, as I will discuss later in this decision, it could very well have been the coal operator's employees who were responsible for the excess accumulations the inspector found. Both Otis and PMC employees had equal access to the elevator equipment, and as I will discuss later, both entities had their own motivations to lubricate or over-lubricate it.

Otis also urges and I am satisfied that they do not extract coal from the mine or perform construction work at the mine nor exclusively control any portion of the mine, including the elevators at issue herein. I also agree that they did not maintain a daily presence at the mine. Nevertheless, they were an independent contractor performing substantial services on critical equipment at the mine. These elevators, although not used to transport coal out of the mine and thus, not per se part of the coal production or extraction process, are used as "man-trips" to transport the production crews into and out of the mine and additionally, are designated escapeways for the mine.

Otis employees regularly and frequently inspect, service and repair these elevators and while Otis does not have exclusive physical control over the elevators themselves, it most certainly did have the responsibility by way of contractual obligation for their inspection, maintenance and repair. Therefore, I agree with the Secretary, as I have before, that the Otis Elevator Company is exactly the type of independent contractor which Congress intended be subject to the Mine Act.

FACT OF VIOLATION - 30 C.F.R. § 77.205(b)

On October 29, 1986, Inspector Niehenke observed an accumulation of oil on the platform below the deflector sheave on both the Cookport and 580 Shaft Elevators. He described the accumulation as covering the entire platforms with anywhere from a thin film to a quarter of an inch of light-colored oil. There were also scattered piles of grease, approximately an inch high, on the platforms, below the sheave wheels in this oil. These platforms were used by mine personnel at least weekly at that time to perform their required inspections of the elevator equipment. Mr. Gach, the Greenwich employee who was responsible for inspecting the elevators, testified that there was no other way to inspect the sheave wheels or hoisting ropes without going out onto these platforms.

Based on the foregoing, I find that the oil accumulations found by Inspector Niehenke on the two platforms presented an unquestionable slipping hazard and therefore constituted violations of the cited mandatory safety standard as alleged in the two citations at bar.

The harder question is which operator, Otis or PMC, is responsible for these violations.

RESPONSIBILITY FOR THE VIOLATION -- STRICT LIABILITY UNDER THE MINE ACT

The Commission has often held that an operator is liable, without regard to fault, for violations of the Act or its regulations committed by its employees. The majority most recently re-affirmed this principle in Western Fuels-Utah, Inc., 10 FMSHRC _____ (March 25, 1988).

It is also clear that there can be more than one "operator" at any particular time in a given mine. As I have already found in this case, Otis was an independent contractor type operator during the term of its contract while PMC remained the mine operator or "owner-operator" throughout the same time period.

The Secretary states and I agree that MSHA may cite either the independent contractor or the mine operator for violations committed by independent contractor employees. Both the Commission and the federal courts have held that owners of coal mines can be held strictly liable for violations of the Act committed by their independent contractors. Republic Steel Corp., 1 FMSHRC 5, 9 (1979); Old Ben Coal Co., 1 FMSHRC 1480, 1481-83 (1979); Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116, 1119 (9th Cir. 1981). However, I am unaware of any authority that stands for the obverse proposition--that the independent contractor is strictly liable for the actions of the coal operator's employees. That very well may be the factual situation we are confronted with in this case, although there is no direct evidence of that. In fact, there is no direct evidence of any identifiable individual or entity that is responsible for the violative condition found by Inspector Niehenke. It is clear that there were two violations extant and that someone's negligence was the cause of their existence. It remains unknown, however, who the negligent actor was and by whom he was employed.

Inspector Niehenke, in his discretion, exercised his judgment and cited Otis Elevator Company for causing the two

violations at bar, rather than the coal operator. I note, however, that the coal operator did not escape unscathed. PMC was also issued two citations that day by Inspector Niehenke for violations of the identical mandatory standard for permitting the slipping hazard to exist on the same two elevator platforms. It appears to me as though the inspector is making the two pools of oil serve double duty as the basis for four rather than two citations, because had he also alleged that PMC was responsible for causing the violative accumulations, since the same mandatory standard is involved, the four "violations" would have merged into two, one for each elevator.

The inspector arrived at his decision to cite Otis, rather then PMC, primarily on the basis of talking with Mr. Gach and his alternate, Mr. Burskey (Tr. 109-110):

> I asked them if they oiled the ropes. They told me no, they did not. They were given instructions not to oil the ropes. I asked them who they thought could have done this, and they felt Otis done it, because Otis does the service contract work on the elevators. That's basically how I came to the conclusion that the contract operator certainly had involvement in these proceedings.

At trial, however, Mr. Gach, who was responsible for servicing the elevators prior to the contract with Otis, admitted that on occasion he still serviced the elevators (Tr. 23):

> Q. Did you ever fill the box with oil when the Otis Elevator people were the contractors?
>
> A. I probably did it once or twice in the years they were there. If you went up there, I was doing my inspection, and the box was dry, you would have to put oil in it.

The inspector did not ask the assigned Otis employee or any Otis employee for that matter what work he had performed on the elevator or who he thought might be responsible for the accumulations. Had he done so, Mr. Shaffer presumably would

have told him, as he did testify, that at the beginning of 1986 he used to add oil to the lubricating boxes [2]/ whenever he thought the ropes needed lubrication. Otherwise, he let them run dry. PMC, however, was concerned that the ropes be lubricated at all times because MSHA had cited it for instances in the past when the hoisting ropes had become rusted. So, beginning in May, 1986, Shaffer added oil to each lubricating box during his inspections at the insistence of mine management. He categorically denies, however, taking any further action with regard to lubricating the ropes at any time during the term of the contract. He specifically denies ever applying oil to those portions of the ropes which do not pass by the lubricating boxes. [3]/ He stated that such lubrication was unnecessary because those 20-30 feet of rope also do not go over the sheave wheel and therefore the internal hemp core of the rope provides sufficient lubrication for those lengths. Shaffer also specifically denies ever adjusting or replacing the wicks on the lubricating devices or in fact doing anything to them other than putting oil in the boxes.

With regard to the grease droppings, Mr. Shaffer testified that he greased the bearings on the deflector sheaves on the two elevators in May of 1986. That was the one and only time he greased those bearings and he never noticed more than a drop or two of grease leaking out of those bearings in the

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[2]/ There were automatic lubricating devices consisting of a lubricating box which holds a quantity of oil and a wick made from a felt pad, installed in the elevator machine room for each of the nine hoisting ropes. The wick extends out of the box so as to be near the rope without actually touching it. The oil is then applied electrostatically to the rope as it passes near the wick. Once the ropes are coated with a thin film of oil, the electrostatic action stops until the rope becomes dry again. At that point, oil is again applied to the rope by electrostatic action.

[3]/ Mr. Gach described a procedure that he has used to manually oil the 20-30 feet of rope that do not pass by the lubricating boxes at Tr. 30:

"There is a certain amount of ropes on the sheave wheel that don't go through the oil, and you have got to go down there with a brush and brush oil on them. I think there are in the neighborhood of twenty feet of rope that won't go through the oil."

He described this as a "messy" procedure and opined that perhaps the Otis technician had done this and not cleaned up after himself.

nearly 6 months between May and October of 1986. Prior to that time, when Otis first took over the maintenance on the elevators from the coal operator, he states those bearings were grossly over-greased and that he had to clean them up weekly, but that by May of 1986, he had the old over-greasing under control.

I find the testimony of Lynn Shaffer to be cogent and internally consistent throughout. I therefore find that testimony to be very credible and I do credit it in making this decision.

The testimony of Mr. Gach by comparison contradicts the Secretary's allegations in places and is internally inconsistent on a critical bit of evidence. He first stated at (Tr. 38-40):

> Q. When had you last had occasion to be on the platform before the citation?
>
> A. It was probably two or three days.
>
> Q. About the time the Otis employee was there?
>
> A. I would say so.
>
> Q. Sometime after he was there?
>
> A. Yes.
>
> Q. But before Leroy [Inspector Niehenke] was there?
>
> A. Yes.
>
> * * * * * * *
>
> Q. Did you see an oil accumulation on that day; the last day prior to the inspection?
>
> A. No.
>
> Q. This is the same for both of these two elevators I take it?
>
> A. Yes.

Then later he testified at (Tr. 56):

Q. The last time you were on the platform there was no accumulation?

A. I'm absolutely sure there wasn't, and I'm sure Otis was there afterwards.

My reading of the record herein including the fact that PMC was very concerned with lubricating these ropes leads me to believe that it is at least as likely that an overzealous PMC employee over-lubricated these ropes and bearings, as an Otis employee.

Apropos this point, Inspector Niehenke was cross-examined concerning his testimony at an earlier hearing about another citation he issued at PMC's North Portal elevator (Tr. 151-153):

Q. I am reading from page 126 of your testimony at a hearing, which is PENN 86-262, which was given on March 31, 1987.

"Question. On February 27 you issued a citation to the mine operator, but on March 3 you issued a citation to Otis?" "Answer. That is correct."

* * * * * * *

Q. The previous citations that you issued were issued to the mine operator because the ropes were over lubricated?

A. Yes.

* * * * * * *

Q. So, you were testifying that the mine operator, Greenwich Collieries, was responsible for over lubrication of the governor ropes on February 27?

A. Yes.

Q. Would you agree that the services that Otis provided to the Cookport and 580 elevators did not differ in any way in the services Otis provided to the North Portal elevator?

A. They provide the same service, yes.

Q. And you determined in issuing your citation that it was the mine operator that was responsible for the over lubrication of the ropes on the North Portal elevator?

A. I couldn't establish it was Otis.

On redirect examination, he reiterated (Tr. 156-157):

Q. Mr. Niehenke, remembering back to the March hearing and what you were talking about there, when you issued those citations on the governor ropes to Greenwich Collieries, why did you issue them to Greenwich instead of to Otis?

A. Because I couldn't establish that Otis put the lubrication on the ropes.

The same problem exists for the Secretary in this case. She cannot establish that Otis put the lubrication on the ropes or over-greased the bearings. In sum, she cannot establish that Otis was the responsible operator. I also find and conclude that the party who was in the best position to eliminate the hazard was the party who in fact did abate the violation, the coal mine operator. Furthermore, I expressly reject the Secretary's contention that Otis can be held strictly liable for violative conditions that were caused by the coal mine operator's employees.

I am not persuaded that the Secretary has met her burden of proof on the issue of whose employees caused these violative conditions and absent a preponderance of the evidence which would tend to establish that it was an Otis employee, I do not believe the citations were properly issued to Otis. Accordingly, I am going to vacate the two citations at bar.

ORDER

It is ORDERED THAT:

1. Section 104(a) Citation Nos. 2690794 and 2690795 ARE VACATED.

2. MSHA's petition for assessment of a civil penalty IS DISMISSED.

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAY 4 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 88-44
	:	A. C. No. 11-00598-03638-A
v.	:	
	:	Peabody Coal Company
KENNETH B. MIRACLE, Respondent	:	Eagle No. 2 Mine
	:	

DECISION

Appearances: Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Petitioner;
David S. Hemenway, Esq., Senior Counsel, Peabody Holding Company, Inc., St. Louis, Missouri, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", charging that "on or about May 28, 1986, Respondent, acting as an agent of the corporate mine operator within the meaning and scope of sections 3(e) and 110(c) of the Act, knowingly authorized, ordered, or carried out, said operator's violation of 30 C.F.R. § 75.200."

Section 110(c) provides as relevant hereto that "[w]henever a corporate operator violates a mandatory health or safety standard ... any ... agent of such corporation who knowingly authorized, ordered, or carried out such violation ... shall be subject to the same civil penalties, fines and imprisonment that may be imposed upon a person under subsections (a) and (d).

Since in this case it is alleged that the Respondent, Kenneth B. Miracle, committed the violation as an agent of the corporate operator, proof of this allegation would be sufficient to also prove that the corporate operator violated the cited regulation. The citation under which the corporate operator was charged alleges as follows:

> The assistant superintendent, K. Miracle, was observed to have come through an area of unsupported roof where a roof fall had occurred. The area of unsupported roof was about 4 to 5 feet wide and 8 to 10 feet between permanent roof supports. The area was located in the first cross-cut outby the tail of the first section of the second main west belt conveyor.

The Secretary maintains that the cited practice constituted a violation of that part of the regulatory standard at 30 C.F.R. § 75.200 that provides "no person shall proceed beyond the last permanent support unless adequate temporary support is provided, or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners" (Tr. 8).

Motion to Dismiss

In a Motion to Dismiss filed with his Answer, Respondent Miracle states six grounds for dismissal, namely:

1. Respondent has not been served with a duly authorized and issued citation or order as required under section 104 of the Act.

2. The petition cites no material or relevant citation or order issued against Respondent as required by 29 C.F.R. § 2700.27.

3. Respondent has been denied due process in that he has been deprived of the right to contest a citation or order as provided in section 105(a) of the Act and 29 C.F.R Sections 2900.20 et. seq.

4. Petitioner has violated its own regulations in proposing to assess a civil penalty without having first reviewed the citation or order as provided in 30 C.F.R. § 100.2.

5. The citation/order attached to said petition was fully disposed of in a civil penalty action brought against the operator and petitioner is estopped to seek additional penalties.

6. Petitioner is guilty of laches in seeking a civil penalty in this cause in that an unreasonable length of time has elapsed and Respondent has materially changed his position.

Mr. Miracle cites no legal authority for his proposition that a respondent in a proceeding under section 110(c) of the Act must be served with a citation pursuant to section 104 of the Act. Indeed the provisions of section 104(a) of the Act specifically limit the issuance of citations to "an operator of a coal or

other mine". See also Secretary of Labor v. Kenny Richardson, 3 FMSHRC 8 (1981), aff'd 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983). The contention is without merit.

Respondent Miracle alleges, secondly, that the Petition for Civil Penalty in this case "cites no material or relevant citation or order issued against [him] as required by 29 C.F.R. 2700.27". The short answer is that Commission Rule 27, 29 C.F.R § 2700.27 is limited by its own terms to proposed assessments of civil penalties against mine operators. There is no similar requirement for cases under section 110(c) of the Act. This contention is therefore also without merit. I note however that, in any event, the Respondent herein was served with a copy of the citation issued to the mine operator and which provided the basis for the proceedings against him under section 110(c) of the Act.

Respondent claims, thirdly, that he was denied due process "in that he has been deprived of the right to contest a citation or order as provided in section 105(a) of the Act and 29 C.F.R. § 2900.20 et. seq." Section 105(a) of the Act is again however specifically limited to citations or orders issued to the mine operator and not to individuals in proceedings under section 110(c) of the Act. In any event the Respondent has had, contrary to his allegation, the opportunity in these proceedings to contest the underlying violation charged in the citation against the mine operator. See Richardson, supra. 3 FMSHRC 8 at p.10.

Respondent maintains, fourthly, that "Petitioner has violated its own regulations in proposing to assess a civil penalty without having first reviewed the citation or order as provided in 30 C.F.R. § 100.2." Respondent has failed to prove as a factual matter that the Secretary did not indeed perform a review pursuant to her own regulations under 30 C.F.R. § 100. Indeed the Secretary denies the allegation. In any event Respondent cites no authority for the proposition that the Secretary must first review a case under section 110(c) of the Act pursuant to those regulations before initiating an action before this independent Commission. Indeed I do not find that it is a statutory precondition to the instant proceedings.

Respondent maintains, fifthly, that "the citation/order attached to said Petition was fully disposed of in a civil penalty action brought against the operator and Petitioner is estopped to seek additional penalties". It is not disputed that Peabody Coal Company, the corporate mine operator, has already paid a civil penalty for the violation of 30 C.F.R. § 75.200 cited in Order/Citation No. 2819724. However the Commission has held that these separate proceedings against the corporate agent under section 110(c) of the Act are not foreclosed by the

separate action against the corporate operator. Richarson, supra., 3 FMSHRC at 10-11.

Finally Respondent alleges that "Petitioner is guilty of laches in seeking a civil penalty in this cause and that an unreasonable length of time has elapsed and Respondent has materially changed his position". Respondent has failed to support this allegation with any evidence that he has "materially changed his position" as a result of any alleged delay in bringing the instant action. In any event the Federal Government is not affected by the doctrine of laches when enforcing a public right. See Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977). Under the circumstances the Motion to Dismiss is denied.

The Merits

Wolfgang Kaak, an inspector for the Federal Mine Safety and Health Administration (MSHA) was conducting a spot inspection of the Peabody Coal Company Eagle No. 2 Mine on the morning of May 28, 1986, when he learned of a rock fall at the tail piece of the 1 South Belt. Unable to obtain a clear view from the west side of the fall because of obstruction from the fall material, Kaak viewed the area from the east side of the fall through a mandoor. Kaak observed material still "dribbling down" from the roof, observed that the rib on the left side was ragged and loose and that the fall area came to within one or two feet of the rib. Kaak also saw that a roof bolt remained in the brow and that there were cracks in the cross-cut on the far side. (See Exhibit R-2). Kaak also observed that the distance between the remaining roof bolts was 13 feet 3 inches in the area of the roof fall. The roof control plan required bolts at 5 foot centers beginning 5 feet from the ribs.

Later, while standing 50 feet to the east of the mandoor (at point D on Exhibit R-2), Kaak saw what appeared to be a caplight emerge from the mandoor. It turned out to be the Respondent, Mr. Miracle. Miracle admitted that he had passed from the south cross-cut through to the east belt. Kaak asked: "Kenny was that area bolted?" and Miracle purportedly responded "yes it was". Later at a meeting in the mine superintendent's office Kaak asked Miracle: "did you go through that area of unsupported roof?", and Miracle allegedly replied "Yes, I hugged the ribline and thought I was in a safe position".

Miracle also admitted at hearing that he had proceeded that morning through the general area of the rock fall but had "hugged the left rib from point B to A" (Exhibit R-2). Miracle explained that he first listened to determine that the top was not working and then proceeded into the subject area on his stomach. He then turned over on his side to look back at the south brow to examine

the crack to determine the length of roof bolt needed to go through the brow. Miracle testified that as he passed through the area he also checked the east brow. The roof in that location was only about 3 feet high because of the debris and it took less than 3 minutes to pass through. Miracle testified that he felt he was protected by the adjacent rib and that the roof support was in fact the rib itself. He further described the area between the rib and the edge of the rock fall as some 2 feet to 3 feet and the actual distance traversed was about 8 feet along this rib. Miracle claims that it was necessary for him to proceed out in the rock fall area as the only way to determine the length of bolts to place in the brow to enable work to resume. Miracle claims that when asked by Kaak if he had come through the unsupported fall area he responded "no, I came along the rib line". Miracle testified that it was not unsafe for him to travel that route but conceded that he would "not probably" have sent someone else into the area.

There is no dispute in this case that the Respondent was, as assistant mine superintendent, an agent of the corporate mine operator. The issue is whether he knowingly carried out a violation of the mandatory standard cited in this case i.e. 30 C.F.R. § 75.202. In this regard I place significant weight on Inspector Kaak's testimony that in response to his question at the meeting in the mine superintendent's office shortly after the issuance of the citation: "did you go through that area of unsupported roof?"; Miracle responded "yes, but I hugged the ribline and thought I was in a safe position". Although in testimony at hearing Miracle essentially denied making that statement, it is apparent that by the date of hearing he had ample opportunity to reflect upon and change the damaging aspects of that prior statement. He also had opportunity to call others present at that meeting as corroborating witnesses at hearing but failed to do so. Under the circumstances I find Inspector Kaak's testimony as to Miracle's admission to be fully credible. This admission in itself is sufficient to prove that Miracle violated the cited standard and that he did so "knowingly".

I also note in this case that Miracle testified that he would "not probably" have sent any other mine personnel into the rock fall area he traversed. Accordingly it may reasonably be inferred from this testimony that Miracle, as a reasonably prudent person familiar with the mining industry and protective purposes of the standard, would not have sent anyone into the subject area because it was not safe for the reason that it was not properly supported within the meaning of section 75.200. See Secretary of Labor v. Canon Coal Co., 9 FMSHRC 667 (1987). This evidence also supports the reasonable inference that Miracle, "knowlingly" violated the standard.

In light of Inspector Kaak's testimony that the roof was still "working", with rock material dribbling down from the area of the rock fall and that the adjacent rib was ragged, loose and with cracks, it is readily apparent that the violation was of the highest gravity. This finding is corroborated by Miracle's acknowledgment that he would not have sent anyone else though this area.

In assessing a civil penalty in this case I have considered the evidence that other Peabody supervisory personnel, who were the subject of Federal criminal indictments for similar violations at the same mine, had been placed on a probationary-type status through a pretrial diversion agreement. I nevertheless believe that a civil penalty is appropriate in this case because of the flagrant nature of this violation and in the presence of other miners. The Respondent thereby demonstrated a contemptuous disregard for a significant safety regulation and set an improper example for his subordinates. Moreover by placing himself in a dangerous position in an area of unsupported roof, Miracle was creating a potentially serious hazard not only to himself but to others who might be called upon to rescue him in the event of a further roof fall.

Under the circumstances I find that a civil penalty of $200 is appropriate.

ORDER

Kenneth B. Miracle is hereby directed to pay a civil penalty of $200 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
(703) 756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 5 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 87-61 A.C. No. 46-01433-03505-S46
v.	:	
	:	Loveridge Mine
J & K CONSTRUCTION COMPANY, Respondent	:	

DECISION

Appearances: William T. Salzer, Esq., Office of the Solicitor U.S. Department of Labor, Philadelphia, PA, for Petitioner;
William A. Johnson, Esq., Washington, PA, for Respondent.

Before: Judge Fauver

This civil penalty proceeding was brought by the Secretary of Labor under the Federal Mine Safety and Health Act of 1977, 30 C.F.R. § 801 et seq.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following:

FINDINGS OF FACT

Order 2698660

1. On September 19, 1986, MSHA Inspector Wayne Fetty inspected a worksite under the control of Respondent, a subcontractor, at the Loveridge Mine No. 22. Respondent was performing metal sheeting work on the outer walls of a preparation plant.

2. Inspector Fetty inspected three scaffolds used by Respondent at the Loveridge worksite. Each scaffold was an electrically powered "working platform" (or hoist) used by two individuals to raise and lower themselves alongside a building. At the time of the inspection no workers were on the scaffolds because of a work stoppage after an accident.

3. The scaffolds were 15 to 75 feet above ground, suspended from outrigger beams on the roof. Two outrigger beams were used

for each scaffold. Counterweights on the outrigger beams balanced the weight placed on the scaffolds. The counterweights were concrete discs held on a retaining rod.

4. On September 19 Inspector Fetty observed seven scaffold rope hooks with defective safety latches in that a spring operated latch was missing or broken. He found a hazardous condition for each latch because of the possibility that the scaffold rope would slip off the hook attached to the outrigger beam.

5. The September 18 entries in Respondent's examination book did not mention defective safety latches. The book contained safety checklists that were to be filled in by the examiner and countersigned by a supervisory official. However, no one countersigned the examination book on September 18 and as a matter of policy and practice, the lead sheeters conducted inspections of the scaffolds and rigging but the foreman made the entries and signed the book in the place for the examiner. The foreman had not been informed by the lead sheeter that the safety latches were missing or defective. As a result of investigations by MSHA prior to September 18, 1986, Respondent was placed on notice of the necessity for thorough daily examinations of the scaffolding equipment.

6. Inspector Fetty found that the counterweight assembly for Scaffold No. 1 did not have a pin for the retainer rod. A missing pin creates a hazardous situation. If the counterweight assembly were tipped to one side, the weights could slip off the retainer rod and the beams and scaffold could fall to the ground. At the time of inspection, Scaffold No. 1 was about 75 feet above ground. Respondent asserted at the hearing that the scaffold was going to be moved and that the retainer pin had been removed for the purpose of relocating the counterwights, but there was no evidence or claim of an intended move at the time of the inspection. The missing pin was was not recorded in the hoist inspection book on September 18.

7. Inspector Fetty observed that No. 2 Scaffold, which was about 15 feet above ground, was missing a backrail. The function of the backrail is to prevent persons from falling backwards off the scaffold. The missing backrail was not noted in the examination book for September 18. The foreman had not been informed by the lead sheeter that the backrail was missing.

8. Based upon his findings of safety defects in the scaffolds and rigging, and his inspection of the examination book for September 18, Inspector Fetty issued Order 2698660, which charges a violation of 30 C.F.R. § 77.1403 based upon the following "Condition or Practice":

> According to the records entered in the approved book 9-18-86 of the daily inspections of the powered scaffolding, used by sheathing personnel, are

inadequate in that upon my inspection of the scaffolding the following conditions was observed. The safety devices for the hooks attached to the outrigger beam located on the 7th floor roof is missing, the missing device is required to prevent the attached rope or cable from slipping off the hook. The two required hooks on each of the scaffolds were found the same way (Safety latches missing a total of seven) the bottom scaffold is not provided with a back guard to prevent a worker from falling, this scaffold is about 14 feet above the ground. The outrigging device installed on the seventh floor is not provided with pins to keep the counterweights from falling off should the outrigger beams turn sideways. A complete inspection of the scaffolding shall be made and the findings recorded in the approved book. Huey Kowcheck is the responsible foreman. The area is the Ludridge coal preparation plant.

Order 2698946

9. On September 18, 1986, MSHA Inspector Homer Delovich inspected Respondent's worksite at the Loveridge Mine No. 22 preparation plant. He was called to the worksite after being informed of an accident there that morning.

10. At the time of the inspection no workers were on the scaffolds because of a work stoppage after the accident. Respondent's contract work was to replace the sheeting on the outside of the preparation plant. Work began around 7:00 a.m. On the morning of September 18 John Carlisle and Dick Guthrie were working in the area of the Nos. 1, 2, and 3 scaffolds shown on Government Exhibit No. 9. Mr. Kowcheck was the foreman for the entire worksite. Inspector Delovich arrived at the worksite between 9:45 and 10:00 a.m. The accident occurred about 9:30 a.m.

11. No protection against falling objects was provided to persons working or traveling under Scaffold Nos. 1, 2 and 3. Individuals were exposed to the hazard of being hit by falling tools, equipment or aluminum sheeting. The area underneath Scaffolds Nos. 1 and 2 was traveled frequently by employees entering or leaving the preparation plant through the lunchroom door or equipment doors. This area was not roped off and danger signs were not provided. Inspector Delovich observed these conditions before the arrival of the ambulance (at 10:10 a.m.) and the removal of the accident victim from the worksite.

12. Respondent was informed by MSHA on prior occasions of the necessity of protecting persons from falling objects from scaffolds.

Order 2698945

13. On September 18, 1986, Inspector Delovich observed that Scaffold No. 2 (Gov. Ex. 9) was resting on top of a tin canopy structure that partially covered an elevated conveyor belt. The tin canopy was bordered by a walkway along the belt. A preponderance of the reliable evidence indicates that the sheeters climbed on the canopy below the scaffold to board or exit No. 2 Scaffold.

Order 2698947

15. On September 19, 1986, Inspector Delovich observed that No. 3 scaffold was located directly beneath an elevated belt conveyor.

16. Workers on No. 3 Scaffold were exposed to a hazard of being struck by broken conveyor belting in the event of an accident or malfunction of the conveyor above them. Broken belt sections could fall through the structure housing the conveyor and strike a worker on the scaffold. This condition exposed workers to a risk of serious injuries.

17. The foreman, Huey Kowcheck, had directed an employee, Scott Morgan, to install a water deflector above Scaffold No. 3 so that sheeters would not be hit with water draining off the conveyor belt. Mr. Kowcheck indicated to MSHA Inspector Paul Moore that the belt was running while sheeters were working on the No. 3 Scaffold.

DISCUSSION WITH FURTHER FINDINGS

Order 2698660

This order cites a violation of 30 C.F.R. § 77.1403 on the ground that an adequate examination had not been made of the three scaffolds on September 18, 1986. The inspector found a number of unsafe conditions but these were not reported in the required examination book and the person who signed the book was not the examiner who actually made the inspection. Inspector Fetty testified that the unsafe conditions included missing safety latches for the suspension ropes on the three scaffolds, a missing retaining pin for a counterweight assembly on one scaffold, and a missing backrail for another scaffold. None of these conditions was reported in the examination book.

Respondent acknowledges fault for one missing safety latch, for a well wheel hoist that transported parts and equipment to a scaffold (Tr. 159-160), but contends that the six outrigger beams were missing safety latches intentionally because they were not required. Inspector Fetty disagreed, and testified that he observed hooks that did not have a required spring safety latch and that when he told the foreman of this the foreman showed him hooks with safety latches that were available but had not been installed.

I accept the inspector's testimony that required safety latches for hooks used to suspend the scaffolds were missing or broken.

With respect to the missing pin for the retaining rod, Respondent contends that the pin had been removed in order to move the scaffold. The inspector testified that the two outrigger beams were approximately parallel and there was no evidence or statement during the inspection of plans to move the scaffold. The post-inspection explanation of Respondent as to the missing pin is not persuasive. There was ample opportunity for Respondent to offer an explanation as to the missing pin at the time the inspector was there, so that the inspector could have investigated the explanation by interviewing witnesses and verifying their statements against the physical evidence. Respondent failed to use this evidentiary opportunity and has not effectively rebutted the inspector's testimony on this point.

Similarly, the missing backrail was not explained by Respondent at the time of the inspection, and its post-inspection explanation is not found persuasive.

Respondent acknowledges that its policy was to have the foreman sign the examination book and not make the safety inspections himself (occasionally he made an inspection) (Tr. 203). This practice does not comply with the requirements of 30 C.F.R. §§ 1403 and 1404, which are interrelated. Section 1403 requires daily examinations of hoists and § 1404 provides that "the person making the [§ 1404] examination shall certify, by signature and date, that the examination has been made" and "If any unsafe condition is found ... the person conducting the examination shall make a record of the condition and the date." Neither of these requirements was met by Respondent, with the result that an adequate examination within the meaning of § 1403 was not made on September 18, 1986. This violation was serious because the purported examination signed by the foreman gave the erroneous representation that the hoists were safe when in fact there were serious safety defects. Given the background of prior accidents, investigations and clear notice to Respondent of the necessity for thorough, accurate safety examinations of the hoists, I find that Responden't violation was unwarrantable.

Considering all of the criteria for a civil penalty under § 110(i) of the Act, I find that a civil penalty of $800 is appropriate for this violation.

Order 2698946

The inspector arrived at the accident site before the ambulance arrived. He saw no evidence of a danger sign or rope to keep people from the area beneath Scaffolds Nos. 1 and 2. Those scaffolds were being used for overhead work before the accident.

Respondent's witness Raymond Jennings testified that the area had been roped off with a danger sign on September 16 and 17, but he was not there on September 18. Respondent's witness Michael Cruny testified that the area was roped off with a danger sign the morning of September 18, but the inspector saw no evidence of a rope or danger sign when he arrived. I accept the inspector's testimony, and find that the inspector reasonably concluded that the area beneath active scaffolds was not protected from falling objects. This was a serious and unwarranted safety hazard in violation of § 77.203.

Considering all of the criteria for a civil penalty in § 110(i) of the Act, I find that a civil penalty of $300 is appropriate for this violation.

Order 2698945

The inspector was justified in finding that employees were boarding and exiting No. 2 Scaffold by climbing on top of a tin canopy. This was not a safe means of access to or from a working place. Respondent contends that each employee was protected by a life line. However, a life line is not intended as a meams of access to or from a scaffold and does not justify subjecting employees to falling hazards by unsafe access means. This was a serious and unwarranted violation of § 77.205.

Considering all of the criteria for a civil penalty in § 110(i) of the Act, I find that a civil penalty of $500 is appropriate for this violation.

Order 2698947

Section 77.400(b) of 30 C.F.R. provides that "Overhead belts shall be guarded if the whipping action from a broken line would be hazardous to persons below." Respondent violated this section by assigning employees to work on a scaffold directly beneath a running, unguarded conveyor belt.

During his inspection, the inspector asked the foreman whether the belt was running when employees were assigned to work on the scaffold beneath the belt and he said, "Yes, the belt was running." Tr. 449. It was not necessary for the Government to prove that the belt had been running when employees were on the

scaffold. It was sufficient to show that, had work progressed without the intervention of the Federal inspection, the employees would, in reasonable probability, be subjected to the hazardous condition cited. This was a serious and unwarranted safety hazard in violation of § 77.400(b).

Considering all of the criteria for a civil penalty in § 110(i) of the Act, I find that a civil penalty of $300 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The undersigned judge has jurisdiction in this proceeding.

2. Respondent violated the safety standards as charged in Orders 2698660, 2698945, 2698946, and 2698947.

ORDER

WHEREFORE IT IS ORDERED that:

1. Respondent shall pay the above civil penalties of $1,900 within 30 days of this Decision.

2. The Secretary's motion to withdraw the charge of a violation in Order 2698948 is GRANTED, and that charge is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 10 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 84-344-D
JERRY DALE ALESHIRE,	:	HOPE CD 84-6
ROY E. CHAMBERS,	:	
CLYDE W. COLIN,	:	Farrell No. 17 Mine
DENIS R. GILLIAM,	:	
RICKY RAY ROE,	:	
WILEY R. KENT,	:	
JOHN E. NEWMAN,	:	
Complainants	:	
v.	:	
	:	
WESTMORELAND COAL COMPANY,	:	
Respondent	:	
and	:	
UNITED MINE WORKERS OF AMERICA (UMWA),	:	
Intervenor	:	

DECISION

Appearances: Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Complainants; F. Thomas Rubenstein, Esq., Big Stone Gap, Virginia, and Thomas C. Means, Esq., Crowell & Moring, Washington, D.C. for Respondent; Mary Lu Jordan, Esq., Washington, D.C., for Intervenor, United Mine Workers of America.

Before: Judge Broderick

STATEMENT OF THE CASE

On August 2, 1984, the Secretary of Labor (Secretary) brought this complaint under section 105(c) of the Federal Mine Safety and Health Act (Act) on behalf of seven [1]/ miners who

1/ The Secretary filed a motion on October 2, 1984, to remove the name Robert L. Harmon and add the name Ricky Ray Roe to the list of Complainants. The motion apparently has not been acted upon. I hereby grant the motion.

worked as surface miners in the subject mine until they were laid off on December 17, 1982. The matter was stayed after the answer was filed, pending decisions in the case of Emery Mining Co. v. Secretary of Labor in the 10th Circuit Court of Appeals,and in the case of Rowe v. Peabody Coal Company, before the Review Commission. The case was assigned to me on October 3, 1986. After the decisions in the Emery case and the Rowe v. Peabody case, this proceeding was further continued because the parties were attempting to stipulate as to the facts. On December 23, 1987, the parties filed Stipulations of Fact and submitted the case for decision as to the question of liability on the basis of the stipulations. The parties have agreed that if the issue of liability is decided in Complainants' favor, they would endeavor to stipulate on "the appropriate damages award."

The Secretary filed a Motion for Summary Decision and a Memorandum in Support of the Motion on February 29, 1988. Respondent filed a Cross-Motion for Summary Decision and a Memorandum in Support thereof on April 12, 1988.

FINDINGS OF FACT

I accept the stipulations as the facts in this case. I note that the briefs filed disagree as to the cause of the layoff in December 1982: the Secretary asserts that it resulted from a disaster at the mine necessitating indefinite cessation of mining. Respondent states that the layoff was the result of weak market conditions which caused the mine to be idled in December 1982, and that the disaster had occurred in November 1980. I do not consider that a resolution of this dispute is necessary for my decision in this case. Both of the parties state in their memoranda that Complainant Newman had been employed as an experienced underground miner on October 13, 1978, when 30 C.F.R. Part 48 became effective and was therefore "grandfathered" and did not need the training which he received to be eligible for recall to an underground position. These facts are not included in the stipulation, but I accept them as facts in the case.

Each of the Complainants was employed at the subject mine in surface positions for three or more years prior to December 17, 1982. Each had underground mining experience prior to working on the surface, but only Complainant Newman was working as an experienced underground miner on October 17, 1978. On December 17, 1982, Complainants were laid off from their surface mining positions. After the lay off, Respondent advised miners at a union meeting, attended by one or more of the Complainants, that they would require new miner underground training before they could work underground. Respondent suggested that to improve their chances for recall, "they would

be well-advised" to obtain such training on their own time and at their own expense.

In May and June 1983, Complainants obtained new miner underground training at the Boone County Career and Technical Center. The training was paid for by the County Board of Education except as to Newman and Gilliam, "each of whom claim they paid $20."

On October 21, 1983, Complainants were recalled to Respondents Hampton No. 3 Mine in underground positions. Under the governing labor contract, miners are entitled to be recalled in accordance with seniority, but seniority presumes the ability to perform the work of the awarded job, which includes having all necessary training. As of October 21, 1983, Complainants would have been eligible for recall to surface positions without additional training. Except for Newman, they would not have been eligible for recall to underground training as of October 21, 1983, had they not taken the underground training referred to above.

On December 21, 1983, Complainants filed a complaint with the Secretary alleging that Respondent discriminated against them by not providing or paying them for the underground training referred to above. They seek an order requiring Respondent to pay them for the 40 hours which they spent taking the underground training course.

ISSUES

1. Whether miners laid off from surface mining jobs who obtained training while on layoff at the mine operator's suggestion, which training is required for reemployment in underground jobs, are entitled to compensation from the mine operator for the time and expenses of such training after being recalled to underground jobs?

2. Whether a miner laid off from a surface mining job who obtained training at the mine operator's suggestion, which training he did not require for reemployment in an underground job, is entitled to compensation from the mine operator for the time and expenses of such training after being recalled to an underground job?

3. Whether the failure by a mine operator to reimburse miners for required safety training under section 115 of the Act is a violation of section 105(c) of the Act?

CONCLUSIONS OF LAW

STATUTORY OBLIGATION

Under section 115 of the Act, mine operators are required to have an approved health and safety training program, which, among other things, must provide that new miners having no underground mining experience shall receive no less than 40 hours of training if they are to work underground. Section 115 requires also that such training shall be provided during normal working hours, and miners shall be paid at their normal rate of compensation while they take such training. New miners must be paid at their starting wage rate.

PART 48 REGULATIONS

Pursuant to the mandate of section 115, the Secretary promulgated training and retraining regulations effective October 13, 1978. 30 C.F.R. Part 48. Subpart A is concerned with underground miners. It defines a new miner as one not employed as an underground miner on the effective date of the rules, and who has not received training acceptable to MSHA from an appropriate State Agency, or in accordance with the requirments of § 48.5, within the preceding 12 months, and who has not had at least 12 months experience working in an underground mine during the preceding three years.

Section 48.10 repeats the requirements of § 115 of the Act that training be provided during normal working hours and that miners attending such training be paid at their normal rate of compensation, which is defined as the rate of pay they would have received had they been performing their normal work tasks. If the training is given at a location other than the normal place of work, miners shall be compensated for the additional costs, such as mileage, meals, and lodging incurred in attending the training sessions.

The term "miner" for the purposes of §§ 48.3 through 48.10 is defined as "any person working in an underground mine and who is engaged in the extraction and production process, or who is regularly exposed to mine hazards, or who is a maintenance or service worker contracted by the operator to work at the mine for frequent or extended periods." The regulations do not refer to laid-off miners or to applicants for underground mine employment.

EMERY

In the case of Emery Mining Corporation, 5 FMSHRC 1391 (1983), the Review Commission held (1) the policy of requiring job applicants to have training as a qualification for employment

is not a per se violation of the Act; and (2) the refusal of the mine operator to reimburse newly hired miners for the time spent in training and costs of training, while relying on the training to fulfill the operator's obligations under section 115, is a violation of the Act. The 10th Circuit Court of Appeals reversed the Commission in the case of Emery Mining Corporation v. Secretary of Labor, 783 F.2d 155 (10th Cir. 1986). The Court held that because the applicants for employment were not miners as defined in the Act, they were not entitled to compensation for the time spent or the costs incurred in the training they received before being employed.

PEABODY AND JIM WALTER

Before the 10th Circuit decision in Emery, the Commission issued its decisions in the Peabody Coal Co. case, 7 FMSHRC 1357 (1985) and the Jim Walter Resources case, 7 FMSHRC 1348 (1985). In the former case, it held that Peabody's policy requiring laid-off miners to obtain necessary training prior to rehire did not violate section 115 of the Act. This was grounded on the theory that laid-off individuals are not miners protected under section 115 until they are rehired. The Commission declined to treat laid-off miners differently for this purpose from applicants for employment, or to interpret the requirements of section 115 in the light of the collective bargaining contract between the mine operator and the union. The Commission further concluded that section 115 requires an operator to reimburse rehired miners for the expenses of their training "if it relies upon the prehire training of those whom it rehires to satisfy its statutory training obligations with respect to 'new miners'." Peabody, at 1364. Peabody had fulfilled this obligation. In Jim Walter (JWR), the Commission addressed the same issues. It repeated its determination that the operator did not violate the Act in by-passing for hire laid-off individuals who lack required training. It also affirmed the ALJ's decision which required JWR to reimburse the rehired miners who had obtained such prehire training for the time and expense of the training. The Secretary appealed the Commission decisions that Peabody and JWR did not violate the Act in refusing to recall laid off miners because they lacked the required training. JWR did not appeal the Commission decision that JWR violated the Act by refusing to compensate recalled miners for the time and expense of training taken while on layoff. The Court affirmed the Commission decisions. Brock v. Peabody Coal Co., 822 F.2d 1134 (D.C. Cir. 1987). The Court stated that "the success of the Secretary's argument depends almost entirely on whether the individuals passed over qualified as 'miners' under section 115 while on layoff." Id., at 1140. The Court affirmed the Commission holding that laid off employees were not "miners" even though they might be "contractually entitled to employment," i.e.,

employees on layoff entitled to recall without reference to training status.

In the case of Secretary/Beavers v. Kitt Energy Corporation, 8 FMSHRC 1342 (1986), Commission Judge Maurer held that a mine operator who laid off surface miners, with seniority and the technical ability to perform available underground jobs, solely because they lacked the additional training required under Part 48, was in violation of the Act. On March 17, 1988, the Commission in an open meeting voted to reverse this decision. See 9 Mine Safety and Health Reporter, Current Report at p. 627 (March 18, 1988). The Commission decision has not been issued as of this date.

The statute and the case law make clear (1) a mine operator who hires an untrained 2/ miner must provide training; (2) a mine operator may hire a miner (newly hired, not on lay-off) who has received training on his own without compensating him for the time and expense of training; (3) "work assignments" made by an operator based on a miner's training status are permissible, i.e., a miner may be laid off if he lacks training required for available positions; (4) a mine operator is not required by the Act to provide safety training for a laid off miner who requires such training for recall. The remaining question is whether a mine operator is required to compensate recalled miners for necessary safety training taken during layoff. More narrowly, are miners covered by a labor agreement who are on layoff entitled to different treatment under section 115 than new applicants for employment? In the Peabody case, the Commission declined to look to the collective bargaining agreement to determine miners' entitlement under section 115. I find nothing in the Act, the regulations or the case law which would permit me to treat differently under section 115, miners laid off with contractual recall rights and new applicants for employment. In Peabody the Commission held that "nothing mandates that we go beyond the Act and the legislative history to determine whether laid off individuals are entitled to section 115 safety training." 7 FMSHRC at 1364. Similarly, nothing mandates going beyond the Act and legislative history to determine whether individuals recalled from layoff are entitled to compensation for section 115 training. Neither miners on layoff nor applicants for mine employment are "miners" for whom the mine operator is required to provide health and safety training, or to reimburse for the time and expense of training taken on their own. To the extent that this interpretation "would result in the effective elimination of

2/ In using the words training here, I am referring to the health and safety training mandated by section 115.

section 115 and the total frustration of the intent of Congress" (Secretary's brief, p. 8), the remedy, as the Court of Appeals said in Brock v. Peabody, supra, lies with Congress.

Therefore, I conclude that miners laid off from surface mining jobs who obtained training while on layoff at Respondent's suggestion, which training was required for reemployment in underground jobs, are not entitled to compensation from the mine operator for the time and expenses of such training after being recalled to underground jobs.

Because of this conclusion, it is not necessary to decide issues 2 and 3, i.e., whether miner Newman who did not need the training is entitled to compensation because he was misled by Respondent into thinking he did require it, and whether a violation of section 115 by refusing to pay compensation for training constitutes adverse action against the miners which can be remedied under section 105(c).

ORDER

Based on the above findings of fact and conclusions of law IT IS ORDERED:

(1) The Secretary of Labor's Motion for Summary Decision is DENIED;

(2) Respondent's Motion for Summary Decision is GRANTED;

(3) This proceeding is DISMISSED.

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 12 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 88-7-M A.C. No. 11-02666-05501
v.	:	
	:	Vandalia Mine
NORTH AMERICAN SAND AND GRAVEL CO., Respondent	:	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner;
Charles W. Barenfanger, Jr., President, North American Sand and Gravel Co., Vandalia, Illinois, pro se.

Before: Judge Maurer

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent with a violation of the safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties, a hearing was held on the merits at St. Louis, Missouri, on March 28, 1988.

Gene Upton, a mine inspector employed by MSHA, had occasion on June 25, 1987, to inspect the Vandalia Mine.

On that occasion he observed a 440-volt power cable which was being used to supply electrical power to the pea gravel conveyor belt. This power cable had several cracks and breaks in the outer layer of its double insulation, which allowed both rainwater and sunlight to reach the inner insulation. There was wet ground under the cable where it drooped down to within three feet of the ground near the steps used to gain access to the plant, and the cable was energized at the time the inspector saw it.

The inspector issued S&S Citation No. 3058100 and cited the respondent for a violation of 30 C.F.R. § 56.12030 which states in its entirety:

> When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.

The inspector felt that because of the wet conditions under the cable where it drooped down within three feet of the ground and that people did travel in this area, the fact that the outer insulation was missing in places was a potentially dangerous condition. I saw the cable in question at the hearing and I agree that it is a potentially dangerous condition and is therefore a violation of the cited standard.

I disagree, however, that this violation is a "significant and substantial" one.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, (1985) the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' U.S. Steel Mining Co., 6 FMSHRC 1834, 1836, (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The facts of this case are to the effect that the interior insulation on all the individual wires was still intact and in good condition at the time of the inspector's visit. It was the outer jacket or the double insulation which was in a deteriorated condition.

The potential hazard involved is electrical shock, but the only way for a person to actually receive such a shock would be for him to come into contact directly with one or more of the bare wires, or if there is sufficient "leakage" through the first layer of insulation. The testimony was that the first layer of insulation was in good condition and I likewise observed it to be so at the hearing. That negates any possibility of a person actually touching a bare wire and receiving an electrical shock. The other possibility simply fails of proof. The inspector testified at (Tr. 27):

> Q. Is there any danger of electrical shock by touching a wire like this with the insulation in this condition?
>
> A. The -- it depends on how good the insulation is. I'm not an electrician and I don't have the instruments to tell me how much leakage there is through that, and that would be the only way I could determine if there's a shock potential there, or how much of a shock potential is by putting a meter on it, and actually measuring the voltage.

Therefore, I find and conclude that the record in this case establishes a nonsignificant and substantial violation of the cited regulation and I further conclude that a civil penalty of $20 is appropriate.

Conclusions of Law

1. The Commission has jurisdiction to decide this case.

2. Respondent violated the mandatory safety standard published at 30 C.F.R. § 56.12030 as alleged in Citation No. 3058100.

3. The violation was not "significant and substantial" within the meaning of the Act.

4. The appropriate penalty for the violation is $20.

ORDER

Citation No. 3058100 is affirmed as nonsignificant and substantial and the respondent IS ORDERED to pay a civil penalty of $20 to the Secretary within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 12, 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JAMES E. BOWMAN, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 88-217-D
	:	MORG CD 87-19
v.	:	Blacksville No. 1 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

ORDER APPROVING SETTLEMENT
ORDER TO COMPLY
ORDER OF DISMISSAL

Before: Judge Merlin

The Secretary on behalf of the complainant has filed a motion to withdraw the complaint and to dismiss this proceeding on the grounds that a settlement has been reached with the respondent. The settlement agreement requires the respondent to; (1) pay the complainant $121.72 for lost wages, (2) expunge from the personal record of the complainant all reference to the illegally issued discipline, (3) post a notice that the respondent will not violate section 105(c) of the Act, and (4) pay a civil penalty of $800.

The settlement is APPROVED as in accordance with the purposes of the Federal Mine Safety and Health Act of 1977.

Accordingly, the motion to withdraw is GRANTED and the parties, if they have not already done so, are ORDERED to comply with the settlement agreement, including the payment of $121.72 for lost wages and payment of an $800 civil penalty, within 30 days from the date of this decision.

It is further ORDERED that once the parties have complied with the settlement agreement this case is DISMISSED.

Paul Merlin
Chief Administrative Law Judge

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAY 13 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. KENT 87-40 A.C. No. 15-08382-03502 M75
v.	:	Docket No. KENT 87-47 A.C. No. 15-08382-03503 M75
TRIPLE B CORPORATION, Respondent	:	South Side Surface Mine

DECISION

Appearances: G. Elaine Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, for Petitioner;
Gary A. Branham, President, Triple B Corporation, Prestonburg, KY, for Respondent.

efore: Judge Fauver

These consolidated proceedings were brought by the Secretary of Labor for civil penalties for alleged violations of safety standards under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following:

FINDINGS OF FACT

Docket KENT 87-40

1. On September 30, 1986, Mine Safety and Health Administration Inspector Andrew Reed, Jr., conducted an inspection at South Side Surface Mine No. 1 operated by the Martin County Coal Corporation. While conducting this inspection, Mr. Reed inspected equipment of the Respondent, an independent contractor engaged in reclamation work at the site.

Citation 2776271

2. A Komatsu bulldozer was not equipped with a reverse alarm.

Order 2776272

3. A Mack truck used for rock haulage was not equipped with an adequate braking system.

Order 2776273

4. A Mack truck was not equipped with a reverse alarm.

Order 2776274

5. A Mack truck was not equipped with a fire extinguisher.

Order 2776275

6. The windshield of a Mack truck contained 11 cracks extending from the center divider and the right side portion was badly broken with a 4" x 6" hole near the bottom of the glass.

Order 2776276

7. A Mack truck was not equipped with a fire extinguisher.

Order 2776277

8. Bryan Childers was observed operating a Mack truck and had not received the required miner training prior to being assigned work duties. He had not received any training since being hired (on September 18, 1986) and according to his 5000.2S Form, his last training in the industry was annual refresher training on March 29, 1985.

Order 2776278

9. A Mack truck used for rock haulage was not equipped with an adequate braking system in that both the right front and right rear wheel brakes were inoperative. The truck was being used on a 17% grade.

Order 2776279

10. A Mack truck had an equipment defect in that the driver's side rear view mirror was broken in three places near the bottom of the mirror, causing a distorted side rear view.

Order 2776280

11. A Komatsu loader was not equipped with a reverse alarm.

Order 2784241

12. A Komatsu loader was not equipped with a fire extinguisher.

13. A Komatsu loader, which was equipped with a roll over protection system, was not equipped with seat belts.

DISCUSSION WITH FURTHER FINDINGS

Respondent contends that its reclamation work was not covered by the Act. This same issue was tried between the same parties and decided in Secretary of Labor v. Triple B Corporation, KENT 87-21 and KENT 87-23 (Judge's Decision, March 15, 1988). That decision controls here by res adjudicata. I hold that Respondent's work at issue was covered by the Act.

Citation 2776271 and Order 2776273

Respondent asserts that at the time of the inspection no one was on foot in the area of the vehicle that had no reverse alarm. I find that this fact does not lower the degree of gravity proved by the Secretary.

Order 2776272

Respondent contends that the cited vehicle "had enough brakes to stop" (Tr. 12), but does not deny that both front brakes were inoperative and the brake drums, shoes, chamber and air line were missing from the right front wheel, and does not deny that the air fitting was plugged off on the right and left front wheels and that the left front wheel brakes line was missing. I find that the brakes were defective and unsafe as charged.

Orders 2776274, 2776276, and 2776280

Respondent contends that the purpose of a fire extinguisher on a vehicle is to protect the vehicle and that, since the driver can escape from the vehicle, the gravity of the violation should be lowered to nonserious. I reject this argument. The driver could be trapped or injuried, so that his access to a fire extinguisher or the access of a rescuer to a fire extinguisher on the vehicle could save the driver's life or lessen burn injuries in a fire emergency.

In Consolidation Coal Corporation v. FMSHRC, 824 F. 2d 1071, 1085 (D.C. Cir. 1987, the court stated:

> The legislative history of the Federal Mine Safety and Health Amendments Act suggests that Congress intended all except "technical violations" of

mandatory standards to be considered significant and substantial. The 1977 amendments redesignated § 104(c) of the Coal Act as § 104(d) of the Mine Act without substantive change.

In Secretary of Labor v. Mathies Coal Co., 6 FMSHRC 1, 3 (1984), the Commission stated:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum [3 FMSHRC 822], the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. As a practical matter, the last two elements will often be combined in a single showing. [Footnote omitted.]

The fire extinguisher violations meet the above test. The MSHA supervisor's modifications of the inspector's orders to change gravity to a nonserious violation is inconsistent with the evidence. I agree with the inspector's testimony and the Secretary's contention that the violations were significant and substantial.

Order 2776278

4. Respondent contends tnat the braking system on the Mack truck was adequate. However, the right rear wheel brakes were inoperative. The Secretary contends that the MSHA supervisor's modification of the inspector's order to a § 104(a) citation "is inappropriate and should be disregarded" because the supervisor failed to obtain information from the inspector and gave no basis for his decision other than the conclusory statement of the operator's representative, who was not present at the time the order was issued. I agree with the Secretary's argument based upon the facts shown by the inspector's testimony.

Order 2776279

Respondent does not deny that the driver's side view mirror on the Mack truck was broken in three places near the bottom of the mirror. Respondent challenges the gravity finding of the inspector on the grounds that the truck driver did not complain about the mirror and part of the mirror gave an undistorted side view. I agree with the Secretary's position that the distortion of part of the driver's side view, because of brakes in the mirror, constituted a substantial and significant violation. The fact that the driver did not complain about the mirror does not

alter the gravity of the violation. I agree with the Secretary's position that the modification of the order by MSHA Supervisor Wilder should be disregarded as being contrary to the evidence. I accept the testimony of the inspector that the broken part of the mirror substantially distorted the driver's side rear view and created a substantial and significant violation.

Order 27784242

Respondent contends that seat belts were not needed because the loader was being operated on level ground. The loader is included in a class of vehicles (§ 77.403a) requiring rollover protection because of a general history of such vehicles turning over. I accept the inspector's testimony that there was a danger of overturning and, therefore, that seat belts were required.

Respondent violated the safety standards as charged in the following citation and orders, and the Secretary proved, by a preponderance of the reliable evidence, the allegations of negligence, gravity, and unwarranted violations. Considering all of the criteria of § 110(i) of the Act for assessment of civil penalties, I find that the following penalties are appropriate:

Violation (30 C.F.R.)			Civil Penalty
Citation	2776271	(§ 77.410)	$ 68
Order	2776272	(§ 77.1605(b))	98
Order	2776273	(§ 77.410)	140
Order	2776274	(§ 77.1109(c)(1))	66
Order	2776275	(§ 77.1605(a))	140
Order	2776276	(§ 77.1109(c)(1))	66
Order	2776277	(§ 48.26(a))	140
Order	2776278	(§ 77.160(b))	68
Order	2776279	(§ 77.1606(c)	114
Order	2776280	(§ 77.410)	140
Order	2784241	(§ 77.1109(c)(1))	66
Order	2784242	(§ 77.1710(i))	140
			$1,246

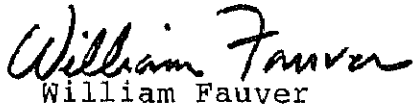
CONCLUSIONS OF LAW

1. The undersigned judge has jurisdiction in these proceedings.

2. Respondent violated the safety standards as charged in the above citation and orders.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the above civil penalties of $1,246 within 30 days of this Decision.



William Fauver
Administrative Law Judge

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MAY 13 1988

WILLIAM G. BINION, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. PENN 87-209-D
	:	MSHA Case No. PITT CD 87-11
KEYSTONE COAL MINING COMPANY, Respondent	:	Urling No. 2 Mine

DECISION APPROVING SETTLEMENT
AND
ORDER OF DISMISSAL

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of alleged discrimination filed by the Complainant William G. Binion against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The complainant alleged that he was transferred from his working section to another section out of retaliation "for my safety and health efforts for myself and other employees." Complainant maintained that he operated his roof-bolting machine at a safe speed, exercising necessary precaution, but that mine management threatened him with another change if he did not bolt faster.

The complainant filed his initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA), and upon completion of its investigation, MSHA advised the complainant that the information received during the investigation did not establish any violation of section 105(c) of the Act. Thereafter, the complainant filed a pro se complaint with the Commission, but subsequently retained counsel and the United Mine Workers of America (UMWA) to represent him in this matter.

The case was scheduled for a hearing on the merits on December 8, 1987, in Indiana, Pennsylvania. However, the hearing was subsequently continued and the matter was stayed after the parties informed me that they had mutually agreed to resolve their differences.

Discussion

On April 28, 1988, Mr. Binion's counsel filed a motion to withdraw the complaint in this matter. As grounds for the motion, counsel has submitted a sworn statement executed by Mr. Binion on May 2, 1988, and it states as follows:

> I, WILLIAM G. BINION, the Complainant in the above captioned action, hereby authorize my attorneys, District #2 Legal Counsel, to withdraw the complaint in the above captioned case. I have amicably resolved this matter with my employer. My counsel has explained my rights, duties and obligations relative to this matter, and I am authorizing the withdrawal of the complaint as my free and voluntary act.

In view of the foregoing, it would appear to me that the parties have settled their differences and have reached an amicable resolution of the dispute which gave rise to the filing of the complaint in this matter. Under the circumstances, I see no reason why the Motion to Withdraw should not be granted.

ORDER

The complainant's Motion to Withdraw his complaint IS GRANTED, and this matter IS DISMISSED. My previously issued Stay Order of December 3, 1987, IS TERMINATED.

George A. Koutras
Administrative Law Judge

Distribution:

David Tulowitski, Attorney-at-Law, 603 N. Julian Street, Ebensburg, PA 15931 (Certified Mail)

Lester Poorman, International Representative, UMWA District #2, 521 West Horner Street, Ebensburg, PA 15931 (Certified Mail)

William M. Darr, Esq., Keystone Coal Mining Company, 655 Church Street, Indiana, PA 15701 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAY 17 1988

CHARLES H. SISK, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 87-212-D
CHAROLAIS CORPORATION, E. R. MINING, INC., D.B.A. as E. R. TRUCKING CO. Respondent	:	MADI CD 87-3
	:	No. 1 Mine

ORDER OF DISMISSAL

Before: Judge Melick

Complainant requests approval to amend his Complaint by dismissing Charolais Corporation as a party Respondent in the captioned case. No objection has been filed to the request and under the circumstances permission to amend is granted. 29 C.F.R. § 2700.11. Charolais Corporation is therefore dismissed as a party Respondent.

Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Daniel N. Thomas, Esq., Thomas & Ison, P.S.C., 1302 South Main Street, P.O. Box 673, Hopkinsville, KY 42240 (Certified Mail)

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D. Patton Pelfrey, Esq., Brown, Todd & Heyburn, 1600 Citizens Plaza, Louisville, KY 40202 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAY 17 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF WILLIAM LEE COOK, Complainant	:	DISCRIMINATION PROCEEDING Docket No. SE 88-39-DM MSHA Case No. MD 87-22 Patton Quarry
v.	:	
PATTON ROCK PRODUCTS, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of alleged discrimination filed by the Secretary of Labor on behalf of William Lee Cook against the respondent pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The complaint alleges that Mr. Cook was discharged from his employment with the respondent because he complained about bad brakes on a front-end loader and threatened to refuse to operate the loader without brakes because he believed it would be unsafe to do so. In addition to Mr. Cook's reinstatement, employee benefits, back pay with interest, and the expungement of the discharge from Mr. Cook's employment records, the Secretary requested a civil penalty assessment of $1,200 against the respondent for a violation of section 105(c)(1) of the Act.

The respondent filed a timely answer denying any corporate liability and the matter was scheduled for a hearing in Chattanooga, Tennessee on June 7, 1988. However, by motion received on May 12, 1988, the Secretary requests approval of a settlement executed by the parties, including Mr. Cook. The terms of the settlement are as follows:

(1) Respondent will pay to Mr. Cook the sum of $756.35 in full and complete settlement of the case, which represents net compensation for the period March 7, 1987, to April 13, 1987, (5 weeks) based on a 40 hour week at $4.50 per hour, plus interest at the rate of 6.13% per annum. Respondent has permanently reinstated Mr. Cook and there is no longer any issue of reinstatement in this case.

(2) Respondent will expunge from the personnel record of Mr. Cook any and all references to his termination from its employ on March 7, 1987, and will not make any adverse comment or recommendation concerning Mr. Cook's employment for the period March 7, 1987, to April 13, 1987, if any inquiries are made.

(3) As part of the settlement, the Secretary agrees to reduce the penalty to $500.00, taking into account the fact that testimony as to what actually occurred during the events which resulted in Mr. Cook's termination would be at variance, particularly as to the authority of the corporate officer who discharged him, and respondent has acted in good faith in agreeing to settle this claim. The Secretary represents that the respondent has agreed to pay the reduced civil penalty assessment of $500.

Conclusion

After careful review and consideration of the settlement terms and conditions executed by the parties in this proceeding, including Mr. Cook, I conclude and find that it reflects a reasonable resolution of the complaint filed by MSHA on Mr. Cook's behalf. Since it seems clear to me that all parties are in accord with the agreed upon disposition of the complaint, I see no reason why it should not be approved. I also find no reason for not approving the reduction of the civil penalty assessment as proposed by the Secretary.

ORDER

The Secretary's motion IS GRANTED and the settlement IS APPROVED. The parties ARE ORDERED to fully comply forthwith with the terms of the settlement. The respondent IS FURTHER

ORDERED to pay to the Secretary a civil penalty assessment of $500 for the violation in question, and payment is to be made within thirty (30) days of the date of this decision and order. Upon receipt of payment by the Secretary, and full compliance with the terms of the settlement, this matter is dismissed. The scheduled hearing is cancelled.

George A. Koutras
Administrative Law Judge

Distribution:

Glenn M. Embree, James L. Stine, Esqs., Office of the Solicitor, U.S. Department of Labor, Room 339, 1371 Peachtree Street, N.E. Atlanta, GA 30367 (Certified Mail)

Kenneth D. Bruce, Esq., 116 East Patton Avenue, Lafayette, GA 30728 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAY 18 1988

MARY M. BALL, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEST 88-5-DM
FMC WYOMING CORPORATION, and SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), and VERNON GOMEZ, DISTRICT MANAGER, ROCKY MOUNTAIN DISTRICT, MINE SAFETY AND HEALTH ADMINISTRATION, Respondents	:	FMC Trona Mine

ORDER OF DISMISSAL

Before: Judge Broderick

On May 16, 1988, Complainant filed a motion to dismiss this proceeding, based on a letter from counsel for MSHA to counsel for Complainant, stating that the Administrator for Metal and Non-metal Safety and Health, MSHA, would advise the District Managers that before complaint correspondence is forwarded to state agencies, the forwarding official should confirm that state agency will keep the names of miner complainants confidential. The letter above referred to is made part of the record in this case.

Premises considered, the motion is GRANTED, and this proceeding is DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

J. Davitt McAteer, Esq., Occupational S&H Law Ctr., 1536 16th St., N.W., Washington, D.C. 20036 (Certified Mail)

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Thomas Mascolino, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

MAY 18 1988

SECRETARY OF LABOR, MSHA on behalf of HARRY THOMAS, Petitioner	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 88-37-D
	:	BARB CD 87-51
v.	:	No. 37 Mine
ARCH OF KENTUCKY, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Fauver

This case is before me upon a complaint alleging discrimination against a miner under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. The parties have filed a motion to approve a settlement agreement and to dismiss the case. I have considered the representations and documentation submitted and I conclude that the proffered settlement is consistent with the purposes of the statute.

ORDER

WHEREFORE IT IS ORDERED that the motion for approval of settlement is GRANTED and Respondent shall pay the approved compensation to Harvey Thomas in the amount of $6,151.02 within 30 days of this Decision. Upon such payment this proceeding is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

May 23, 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 88-29
	:	A. C. No. 41-02632-03509 DB3
v.	:	
	:	Martin Lake Strip Mine
H. B. ZACHRY COMPANY, Respondent	:	

DECISION

Appearances: Jerome Kearney, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas for Petitioner; Richard L. Reed, Esq., Johnston, Ralph, Reed & Watt, San Antonio, Texas for Respondent

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act." The Secretary charged the H. B. Zachry Company (Zachry) with three violations of mandatory standards following an investigation by the Federal Mine Safety and Health Administration (MSHA) of a fatal accident at the Texas Utilities Mining Company's Martin Lake Strip Mine on December 23, 1986. Zachry thereafter filed a Motion for Summary Decision pursuant to Commission Rule 64, 29 C.F.R. § 2700.64 and a preliminary hearing was held limited, at Respondent's request, to that motion.

Zachry argues that it is not subject to the Act because it did not have a continuing presence at a "mine" as defined in the Act and that it was not an "independent contractor" within the scope of the Act while performing repairs outside the bucket repair shop area. It further argues that its repair services were in any event "de minimis" and, therefore, under the principles set forth in Old Dominion Power Co. v. Donovan, 772 F.2d 92 (4th Cir. 1985) it was not subject to the Act. For the reasons that follow I find the contentions to be without merit.

Section 3(h)(1) of the Act reads in part as follows:

"Coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form ...

(B) private ways and roads appurtenant to such area, and (C) lands, excavations ... and workings, structures, facilities, equipment, machines, tools, or other property .. used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form ...

This definition, while not without bounds, is expansive and is to be interpreted broadly. Secretary v. U. S. Steel Mining Inc., 10 FMSHRC 146 (1988); Dilip K. Paul v. P.B.-KBB Inc. 7 FMSHRC 1784 (1985), aff'd sub. nom. Dilip K. Paul v. FMSHRC, 812 F.2d 717 (DC Cir. 1987), cert. denied 107 S. Ct. 3269 (1987).

The evidence in this case shows that Zachry maintains a repair shop and repair yard at the Texas Utilities Mining Company's (TUMCO) Martin Lake Strip Mine. According to Ronald Goodwin, project manager for Zachry, Zachry had contracted with TUMCO to perform repair work at its mine under which TUMCO directs what is to be done and pays Zachry at an hourly rate to complete the job. Goodwin acknowledged that Zachry keeps 6 to 7 employees at the repair shop on a full-time, 40-hour-work-week basis. According to Goodwin the Zachry employees spend 90 percent of the time repairing dragline buckets at the repair yard but occasionally go to the pit areas to work at the draglines. These employees also operate forklifts or "cherry pickers" around the repair shop to lift parts or equipment necessary to make repairs. Zachry uses its own forklift, and welding and hand tools.

MSHA Inspector Donald Summers testified that the Martin Lake Strip Mine had been under his inspection area for nine years and that Zachry had been operating there for about the same period. Zachry was primarily responsible for repairs on the dragline bucket but also performed work on bulldozers, and haulers and "whatever else that the operator deems necessary for them to do". He noted that the dragline bucket is an integral part of the mining process and was used to remove the overburden from the lignite ore. Summers observed that Zachry personnel also performed repair work at the mine pit, the crusher area and the silo area of the mine.

According to Summers the shop area where most of Zachry's work is performed is not physically separated from any other part of the mine but is located between the haulage road and the mine railroad to the north of the crusher. This is approximately 60 to 80 feet from the mine haulage road, 40 to 60 feet from the mine railroad, 800 feet from the crusher area and 600 feet from the fuel truck stop.

Within this framework of evidence it is clear that Zachry was indeed an "independent contractor" performing repair work on a daily basis at the Martin Lake Strip Mine and that its services were accordingly not "de minimis" within the meaning of Old Dominion Power Company, supra.

Zachry's other arguments--that it was not "properly notified" that the citations would be enforced and that the Secretary failed to set forth sufficient reasons for her special assessment--are also without merit. Neither allegation has an undisputed factual basis nor legal merit. The Motion for Summary Decision is accordingly denied.

Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Jerome T. Kearney, Esq., U.S. Department of Labor, Office of the Solicitor, 525 Griffin Street, Suite 501, Dallas, TX 75202 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAY 25 1988

KENNETH J. PEDERSEN, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. PENN 88-58-D
DARMAC ASSOCIATES CORP., Respondent	:	PITT CD 87-17

ORDER OF DISMISSAL

Before: Judge Weisberger

On May 6, 1988, Respondent filed a Motion to Dismiss Complaint's complaint on the ground that his claims has been resolved in the settlement of a related proceeding before the National Labor Relations Board. In its Motion Respondent alleged that the Complainant consented to this Motion. On May 6, 1988, the Complainant filed a signed statement in which he indicated as follows "Based upon a resolution of all outstanding claims arising from discharge from DARMAC Associates Corp., I hereby wish to withdraw my discrimination complaint and the appeal pending before you."

Therefore, in the interest of justice, the complaint herein is DISMISSED, and this case is DISMISSED pursuant to 29 C.F.R. § 2700.11.

Avram Weisberger
Administrative Law Judge

Distribution:

Mr. Kenneth J. Pedersen, Box 206, R. D. 1, Barnesboro, PA 15714 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAY 26 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 88-19-M A.C. No. 41-03055-05506
v.	:	
CEN-TEX READY MIX CONCRETE, COMPANY, INCORPORATED, Respondent	:	Docket No. CENT 88-41-M A. C. No. 41-03055-05507 Lampasas Quarry

DECISION APPROVING SETTLEMENT

Appearances: Mary E. Witherow, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas for Petitioner;
John D. Austin, Esq., Arter & Haden, Washington, D.C. for Respondent.

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed an original and an amended motion to approve a settlement agreement proposing a reduction in penalty from $10,957 to $6,957. I have considered the representations and documentation submitted in these cases, and while I do not accept Respondent's claim that an independent contractor was responsible for several of the violations, nevertheless conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay penalties of $6,957 within 30 days of this order.

Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Mary E. Witherow, Esq., Office of the Solicitor, U.S. Department of Labor, 525 South Griffin Street, Suite 501, Dallas, TX 75202 (Certified Mail)

John D. Austin, Esq., Arter and Hadden, 1919 Pennsylvania Ave., N.W., Suite 400, Washington, D.C. 20006 (Certified Mail)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 26, 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 88-76 A. C. No. 46-01454-03725
v.	:	Pursglove No. 15 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	
CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEVA 88-4-R Order No. 2903242; 9/8/87
v.	:	Pursglove No. 15 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine ID 46-01454

DECISION
ORDER OF DISMISSAL

Appearances: Anita D. Eve, Esq., Office of the Solicitor, U. S. Department of Labor, Pittsburgh, Pennsylvania, for Petitioner.

Before: Judge Merlin

These cases are a petition for the assessment of a civil penalty filed by the Secretary of Labor against Consolidation Coal Company, and the accompanying notice of contest filed by the operator. At the hearing, the Solicitor moved to withdraw the petition and have the notice of contest dismissed on the grounds that the subject citation was vacated by MSHA. On the record the Solicitor's motion to withdraw was granted. This hearing took place at the time other cases involving the parties were heard on the merits.

ORDER

The order of dismissal rendered from the bench is hereby AFFIRMED and these cases are DISMISSED.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Anita D. Eve, Esq., Office of the Solicitor, U. S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Pittsburgh, PA 15241 (Certified Mail)

Michael R. Peelish, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

UMWA, 900 15th Street, N.W., Washington, DC 20005 (Certified Mail)

Lawrence Beeman, Director, Office of Assessments, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Handcarried)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAY 31 1988

CEN-TEX READY MIX CONCRETE COMPANY, INCORPORATED, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. CENT 87-83-RM
	:	Citation No. 2846001; 6/2/87
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. CENT 87-84-RM
	:	Citation No. 284602; 6/2/87
	:	Docket No. CENT 87-85-RM
	:	Citation No. 2846003; 6/2/87
	:	Docket No. CENT 87-86-RM
	:	Citation No. 2868356; 6/2/87
	:	Docket No. CENT 87-87-RM
	:	Order No. 2868356; 6/2/87
	:	Docket No. CENT 87-88-RM
	:	Citation No. 2868357; 6/2/87
	:	Docket No. CENT 87-89-RM
	:	Citation No. 2868358; 6/2/87
	:	Docket No. CENT 87-90-RM
	:	Citation No. 2868471; 6/2/87
	:	Docket No. CENT 87-91-RM
	:	Citation No. 2868473; 6/2/87
	:	Lampasas Quarry
	:	Mine I.D. No. 41-03055

ORDER OF DISMISSAL

Appearances: Mary E. Witherow, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas for Petitioner;
John D. Austin, Esq., Arter & Haden, Washington, D.C. for Respondent.

Before: Judge Melick

Contestant has requested to withdraw its Contests in the captioned cases in connection with a settlement agreement reached in the related civil penalty proceedings. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. These cases are therefore dismissed.

Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

John D. Austin, Esq., Arter and Hadden, 1919 Pennsylvania Ave., N.W., Suite 400, Washington, D.C. 20006 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
333 W COLFAX AVENUE SUITE 400
DENVER, COLORADO 80204

May 20, 1988

EMERY MINING CORPORATION AND/OR UTAH POWER & LIGHT COMPANY, Contestant	CONTEST PROCEEDINGS
v.	Docket No. WEST 87-130-R Citation 2844485; 3/24/87
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Docket No. WEST 87-131-R Order 2844486; 3/24/87
and	Docket No. WEST 87-132-R Order 2844488; 3/24/87
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor	Docket No. WEST 87-133-R Order 2844489; 3/24/87
Docket No. WEST 87-155-R Citation 2844811; 3/24/87	Docket No. WEST 87-134-R Citation 2844490; 3/24/87
Docket No. WEST 87-156-R Order 2844813; 3/24/87	Docket No. WEST 87-135-R Citation 2848891; 3/24/87
Docket No. WEST 87-157-R Order 2844815; 3/24/87	Docket No. WEST 87-136-R Citation 2844492; 3/24/87
Docket No. WEST 87-158-R Citation 2844816; 3/24/87	Docket No. WEST 87-137-R Citation 2844493; 3/24/87
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Docket No. WEST 87-244-R Citation 2844830; 8/13/87	Docket No. WEST 87-152-R Order 2844807; 3/24/87
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Docket No. WEST 87-247-R Citation 2844833; 8/13/87	
Docket No. WEST 87-248-R Citation 2844835; 8/13/87	
Docket No. WEST 87-249-R Citation 2844837; 8/13/87	

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 87-208
	:	A.C. No. 42-00080-03578
	:	
	:	Docket No. WEST 87-209
v.	:	A.C. No. 42-00080-03579
	:	
	:	Docket No. WEST 88-25
EMERY MINING CORPORATION, UTAH POWER & LIGHT COMPANY, Respondent	:	A.C. No. 42-00080-03584
	:	Wilberg Mine
and	:	
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor	:	

ORDER

The matter at issue involves a motion in limine filed by Emery Mining Company, (EMC), to exclude as evidence a document entitled "Report of Investigation, Underground Coal Mine Fire, Wilberg Mine, I.D. No. 42-00080, Emery Mining Corporation, Orangeville, Emery County, Utah, December 19, 1984", hereafter referred to as "Wilberg Mine Fire Report" or "Report".

The Secretary and Emery have filed briefs in support of their positions.

The admissibility of the Report was set for oral argument but in the interest of informed litigation planning the parties waived oral arguments and submitted the issues.

As a foundational matter the parties also stipulated that Donald W. Huntley, a witness offered by the Secretary, would testify and identify the Wilberg Mine Fire Report as the document prepared by the Secretary. Further, the document is the final and official MSHA report on the fire and that it was released on August 7, 1987.

The abstract of the report indicates that it deals with the Wilberg mine fire that occurred on December 19, 1984. The authors are identified as Cavanaugh, Denning, Huntley, Oakes and Painter. The originating office is that of the Administrator, Coal Mine Safety and Health, 4015 Wilson Boulevard, Arlington, Virginia 22203.

The table of contents of the report (omitting page references) reads as follows:

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Illumination
Mine Drainage System

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- Initial Explorations
- Mine Rescue Team Response

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- Recovery of the Mine
- Recovery Entries
- Recovery of the Fire Area

Investigation of the Accident
- Participants
- Sworn Statements
- Underground Investigation

DISCUSSION AND EVALUATION

Discussion and Evaluation of Report

The Commission has previously ruled that properly admitted hearsay testimony, and the reasonable inferences drawn from it, may constitute substantial evidence if the hearsay testimony is surrounded by adequate indicia of probativeness and trustworthiness. It is accordingly necessary to explore the crucial issue of trustworthiness to avoid unfairness to Emery and UP&L at an evidentiary hearing. Mid-Continent Resources, Inc., 6 FMSHRC 8, 12n. 7, aff'd, 689 F.2d 632 (6th Cir. 1982), cert denied, ___ U.S. ___, 77 L.Ed. 2d 299 (1983); Richardson v. Perales, 402 U.S. 389, (1971); Commission Rule 60(a), 29 C.F.R. § 2700.60(a). To determine such issues it is necessary to review in detail the proffered exhibit.

Basically, the Report is a characterization of the events of the Wilberg Fire. It focuses on MSHA's enforcement actions regarding the alleged regulatory violations now in dispute and pending for a hearing. For example, see pages 88-92 of the Report which summarize the severity of the fire and specify alleged contributory violations of the Mine Act and implementing MSHA regulations. The MSHA officials who signed the citations and orders (James E. Kirk and Lawrence J. Ganser) are listed in Appendix C of the Report as persons who participated in the investigation. MSHA's dual roles both as author of the report and as regulator are thus inextricably connected. Thus, I believe the Secretary's Report is at the opposite end of the reliability spectrum from the routine medical reports prepared by independent physicians deemed admissible by the Supreme Court in Richardson v. Perales, supra.

Further in support of the view that the exhibit should be excluded I find the Report is a wealth of factual and legal conclusions simply stated but without any apparent foundation. For example, the GENERAL INFORMATION 1/ section contains certain detail relating to Emery, its principal officers and mine management and it deals with the history of the mine. The section has 19 subparts. A reading of these subparts shows they should not be received in evidence without further foundation. For example,

DESIGNATED ESCAPEWAYS 2/ reads as follows:

> Generally, the two designated escapeways from working sections to the surface were the diesel roadway (intake)

1/ Pages 1-7.
2/ Page 5.

and the belt conveyor entries. The escapeways were parallel and adjacent in the 1st North areas of the mine. Concrete block stoppings, aluminum overcasts and material doors were used to separate the two escapeways in the 1st North area. Ladders or ramps were provided at overcasts to facilitate travel over these structures. There were deficiencies in both the route and condition of these escapeways, details of which are discussed in other parts of the report.

Needless to say the deficiencies, if any, in the escapeways are contested issues in WEST 87-133-R, WEST 87-157-R, WEST 87-163-R and in penalty case WEST 87-208.

Further, the subpart dealing with SMOKING [3]/ provides as follows:

EMC had not submitted to MSHA a search program to ensure that smoking articles were not taken into the mine. A search program had been submitted by Peabody Coal Company and approved by MSHA on May 8, 1974, but EMC had not formally adopted the program. Records indicating that searches for smoking articles were being made were contained in a book on the surface; however, sworn statements from several miners indicated that they had not been searched for several months.

Again, these are contested issues in WEST 87-156-R and in the penalty case WEST 87-209.

Further, the subpart dealing with a TRAINING PROGRAM [4]/ reads as follows:

EMC's training and retraining plan, which was submitted in accordance with 30 CFR Part 48, was approved by MSHA on April 28, 1983. According to sworn statements, instruction was being given in accordance with this plan. However, the SCSR training was not adequate and is discussed in other parts of this report.

Again, these issues are contested in WEST 87-134-R and the penalty case, WEST 87-208.

Further, and by way of illustration, it is apparent that a closely contested issue, both legally and factually, focuses on the source of the fire. The Report deals extensively with

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3/ Page 6.
4/ Page 7.

MSHA's analysis of how the fire started 5/, considers and eliminates other potential sources 6/ and reviews the EMC version. 7/

These assertions may or may not be true but credibility issues abound in the case.

It is the judge's view that the hearing such as involved here, conducted under the Administrative Procedure Act, entitles mine operators to conduct such cross-examination "as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556. Hearing procedures under the Act must comport with procedural due process and be fundamentally fair. Southern Ohio Coal Co. v. Donovan, 774 F.2d 693 (6th Cir. 1985). See also Calhoun v. Bailar, 626 F.2d 145, 148 (9th Cir. 1980).

The Secretary contends the Report is admissible because it is a public report investigated and issued under Section 103 of the Act. 8/

I agree the Secretary certainly has the statutory authority to disseminate information relating to the causes of accidents and disasters, but the trustworthiness limitation on its admissibility in an administrative hearing has been expressly articulated by the Supreme Court in Richardson v. Perales, 402 U.S. at 403-405. In addition, while the Secretary may disseminate information to the public his posture here is substantially different in that in these proceedings he is seeking substantial monetary penalties against Emery and UP&L.

I agree with the case law cited by the Secretary that an investigative report prepared by a government agency pursuant to

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5/ Page 56-68.
6/ Page 68.
7/ Page 79-80.
8/ Section 103 provides in relevant part:

INSPECTIONS, INVESTIGATIONS, AND RECORDKEEPING

SEC. 103. (a) Authorized representatives of the Secretary of the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. . . . (emphasis added).

law creates a presumption of a admissibility. However, often this presumption of trustworthiness is rebutted on the basis of factors which are present in this case. For example, in Miller v. Caterpillar Tractor Co., 697 F.2d 141, (6th Cir. 1983) the Court observed that the investigative report which was refused admission was prepared by [the] ... United States Bureau of Mines, pursuant to authority vested by statute, 30 U.S.C. §§ 3- and 5. 9/ The fact that the investigative report in Miller was prepared pursuant to a duty imposed by law was the beginning, not the end, of the trustworthiness analysis. In Miller, the Court excluded the Bureau of Mines report relying on a determination of untrustworthiness.

Miller is now reviewed in detail since it illustrates some of the issues that arose in that case. We will consider each of the six factual determinations made by the trial court in Miller to determine a lack of trustworthiness.

First, the investigation commenced approximately three days after the accident occurred. The writer does not consider that the time lapse is a factor in the Wilberg Fire Report. The fire commenced December 19, 1984 and MSHA's personnel were present at the scene that day.

9/ 30 U.S.C. § 3 provides, in part:
It shall be the province and duty of the Bureau of Mines, subject to the approval of the Secretary of the Interior, to conduct inquiries and scientific and technologic investigations concerning mining, and the preparation, treatment, and utilization of mineral substances with a view to improving health conditions, and increasing safety. . . .
(emphasis added)

30 U.S.C. § 5 provides:

The Director of the Bureau of Mines shall prepare and publish, subject to the direction of the Secretary of the Interior, under the appropriations made from time to time by Congress, reports of inquiries and investigations, with appropriate recommendations of the bureau, concerning the nature, causes, and prevention of accidents, and the improvement of conditions, methods, and equipment, with special reference to health, safety, and prevention of waste in the mining, quarrying, metallurgical, and other mineral industries; the use of explosives and electricity, safety methods and appliances, and rescue and first-aid work in said industries; the causes and prevention of mine fires; and other subjects included under the provisions of sections 1, 3, and 5 to 7 of this title.
(emphasis added)

The second factor in Miller was that "the author of the report possessed no first hand knowledge of the incident". In the instant case it is not facially shown what knowledge the authors had concerning the fire.

The third factor is that "the author of the report relied upon information received from various other persons". This element is apparent from the context of the Report.

Fourth, "the sources of information were suspect as to hearsay". While hearsay is admissible the hearsay here no doubt forms bases that are supportive of MSHA's position.

Fifth, Miller's author was a mining engineer and was not facially qualified to render opinions and conclusions relating to mechanical operations and/or failures. The writer finds this facet is most troublesome in this case. The only reference to the qualifications of the experts and specialists appears in the Report. 10/ Initially, the Report furnished a broad umbrella for the experts and specialists. It reads:

> Extensive Testing and Involvement of Experts and Specialists
>
> The underground investigation consisted of detailed examination of the affected areas of the mine, particularly the accident area to determine the origin of the fire and the circumstances surrounding it. Extensive evidence was gathered and equipment was tested. All of the information and data was throughly analyzed. The investigation was a painstaking process which involved many experts and specialists from the various segments of MSHA. Other government entities and the private sector were also involved. A structured analysis (fault tree) was conducted and consisted of potential sources based on examinations and laboratory test results, analysis of sworn statements, and other physical factors and phenomena of the mine fire. Special laboratory services from the FBI, the Bureau of Mines, and MSHA Technical Support were obtained for the expert examination of many important items.

Further, concerning an independent expert the Report reads:

> Independent Expert Analysis
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> MSHA engaged John Nagy as a consultant to perform an independent study and analysis of the Wilberg fire. Mr. Nagy is a renowned mine expert, having spent his entire

10/ Page 28, 29.

42-year career, most of it with the Bureau of Mines, researching and investigating mine fires and explosions. Mr. Nagy's report of his findings can be found in Appendix H.

The services of PTL-Inspectorate, Inc. (PTL) were also engaged to perform tests and analysis on critical compressor parts. Their independent opinions and conclusions are discussed in the Discussion and Evaluation section of this report. PTL's test results can be found in Appendix K.

John Nagy may well be a "renowned mine expert" but his expertise is not shown on page 29 of the Report, nor in his findings in Appendix H.

Sixth, in Miller the report "included a conclusion as to the cause of an accident which was not independently verifiable". In this case the Report contains a wealth of conclusions not independently verifible. See also McKennon v. Skil Corporation, 638 F.2d 270, 278 (1st Cir. 1981), a products liability case, where the Court excluded as untrustworthy [under Rule 803(8), FRE] an accident report prepared by the Consumer Product Safety Commission.

The Secretary, in support of his position on admissibility and trustworthiness cites Richardson v. Perales, supra, as well as In Re Japanese Electronics Products, 723 F.2d 238, 265 (3rd Cir. 1983); Melville v. American Home Assurance Co., 584 F.2d 1306, 1316 (3rd Cir. 1978); and Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467, 473 (3rd Cir. 1950); Robbins v. Whelan, 653 F.2d 47 (1st Cir. 1981); cert denied 454 U.S. 1123, (1981). He further seeks to distinguish Miller from the facts in the Wilberg Report.

The Supreme Court case, Richardson v. Perales, 11/ has been discussed, supra. It supports Emery rather than the Secretary, 402 U.S. at 403-405.

In Re Japanese Electronics Products 12/ merely states the general law that an investigative report prepared by a government agency creates a presumption of admissibility. For the reasons previously outlined I believe this presumption has been overcome.

In Melville v. American Home 13/ the Court ruled that documents prepared by the FAA pursuant to FAA regulations were admissible unless the party challenging the directives comes

11/ Medical reports admitted.
12/ Findings by Japanese Fair Trade Commission pursuant to Japanese Anti-Trust Law held admissible.
13/ Air worthiness Directives prepared by FAA held admissible.

forward with evidence impuning their trustworthiness, 584 F.2d at 1316. Air worthiness directives are vastly different from the Fire Report here. Further, the Report itself, as previously noted contains the material supporting its own exclusion.

In Moran v. Pittsburgh-Des Moines [14]/ the Court allowed in evidence a report on the cause of a gasoline tank explosion. However, the Secretary's reliance on Moran is misplaced. The Moran case arose before Rule 803(8)(c) and its trustworthiness standard was adopted. Specifically, it arose under the old business record statute. As the Sixth Circuit recently stated the "precedential value of Moran is suspect. ..." Miller v. Caterpillar Tractor Co., 697 F.2d at 144 n. 1.

In Robbins v. Whelan [15]/ the Court ruled that the jury should have been permitted to hear evidence of the braking performance of new cars.

The Secretary also seeks to distinguish Miller. She claims Miller is not persuasive because the engineer who drafted the report did not arrive on the scene until three days after the accident. At that time the accident had been cleared up. Further, the engineer based her findings solely on interviews. In contrast, the Secretary asserts her report is based on an investigation by a "team of experienced investigators and experts". As previously noted the experience and skill of the investigators is not facially apparent.

For the reasons previously stated I conclude that the Wilberg Mine Fire Report should be and is excluded as evidence.

Additional issues urged by Emery should be considered. Emery argues the Report is untrustworthy because of political motivation. This arose because the report was prepared during Congressional hearings relating to the fire. It is claimed that the Congressional committee questioned MSHA's ability to protect miners, its ability to conscientiously enforce the Act, its own alleged culpability and the adequacy of its accident investigation.

Political motivation can be a basis to exclude government reports. [16]/ However, only minimal portions of the transcript of the hearings were filed in this case. It is accordingly not possible to form a conclusion that the report was politically motivated. Emery's contentions in this respect are accordingly rejected.

14/ Bureau of Mines report on cause of gasoline tank explosion admitted.

15/ The Appellate Court ruled it was error to exclude Department of Transportation braking performance report.

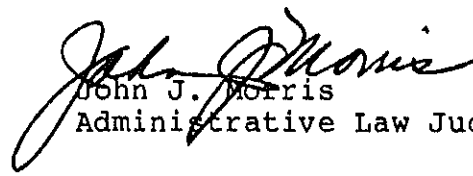
16/ Baker v. Firestone Tire and Rubber Co., 793 F. 2d 1196, 1199 (11th Cir. 1986); United States v. Durrani, 659 F. Supp. 1183 (D. Conn. 1987).

Emery also contends that the company and a number of its former employees are currently the subject of a criminal investigation being conducted by MSHA for submission to the U.S. Attorney for the District of Utah. Contrary to Emery's views, the admissibility of the Report is not related to the criminal investigation. Rather, its admissibility is determined by the Mine Act, the Commission's rules, and the case law precedent cited above.

Accordingly, for the reasons stated herein I enter the following:

ORDER

The proffer of the exhibit 17/ identified as "Report of Investigation, Underground Coal Mine Fire, Wilberg Mine, I.D. No. 42-00080, Emery Mining Corporation, Orangeville, Emery County, Utah, December 19, 1984" is refused.



John J. Morris
Administrative Law Judge

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17/ The exhibit is filed in Official Commission File No. 7 of WEST 87-130-R.

/bls

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